

COPY



STATE OF NEW MEXICO  
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED REPEAL  
OF 20.2.85 NMAC, MERCURY EMISSION STANDARDS  
AND COMPLIANCE SCHEDULES FOR  
ELECTRIC GENERATING UNITS

No. EIB 13-09 (R)

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

Pursuant to 20.1.1.302.A NMAC, the New Mexico Environment Department ("NMED" or "Department") hereby submits its Notice of Intent to present technical testimony in this proceeding.

1. Person Represented By the Technical Witnesses.

The New Mexico Environment Department, Environmental Protection Division, Air Quality Bureau.

2. Name and Qualifications of Each Technical Witness.

Robert Spillers. Robert Spillers is an Environmental Analyst in the Planning Section, Air Quality Bureau, of the New Mexico Environment Department. He has worked with the Air Quality Bureau since September of 2005. Mr. Spillers holds a Bachelor of Science degree in Environmental Science and Management from New Mexico Highlands University. His resume is attached as NMED Exhibit 1.

Rita Bates. Rita Bates is Chief of the Planning Section of the Air Quality Bureau, New Mexico Environment Department. She has 24 years' experience in the environmental field,

including 15 years with the Air Quality Bureau. In addition to her work in the Planning Section of the Air Quality Bureau, Ms. Bates has worked in industry as an environmental coordinator and in environmental consulting as a project manager. Ms. Bates holds a Bachelor of Science degree in Biology from Humboldt State University.

Ned Jerabek. Ned Jerabeck is the Permitting Major Source Section Manager in the Air Quality Bureau. Mr. Jerabek has a Bachelor of Science in Physical Science/Atmospheric Physics – Meteorology Emphasis from Northern Arizona University, and a semester at the United States Merchant Marine Academy while on special duty for the National Oceanic & Atmospheric Administration (NOAA). He has been with the Bureau in the permitting section since 1992 and assumed the management duties for the Title V Operating Permit program in 1997 and the Permitting Major Source Section in 2010. His prior experience includes 10 years of environmental compliance work for Phelps Dodge Corporation, and two years environmental research with NOAA as Meteorological Science Officer aboard the NOAA Ship Discoverer. A summary of Mr. Jerabek's management and professional experience is included as NMED Exhibit 11.

3. **A Copy of the Direct Testimony of Each Witness in Narrative Form.**

A copy of the written direct testimony of Mr. Spillers is attached as NMED Exhibit 4. Mr. Spillers will provide a brief summary of his testimony during the hearing. The Department does not intend to present direct testimony by Ms. Bates or Mr. Jerabeck, but may present them as rebuttal witnesses, and will make them available to assist in answering questions that may go beyond the scope of Mr. Spiller's expertise.

4. **Text of Recommended Modifications to the Proposed Regulatory Change**

The Department recommends that the Board requests that the Board Repeal 20.2.85 NMAC in its entirety.

5. **List and Description of Exhibits**

The Department submits the following exhibits:

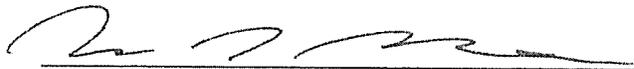
|                     |  |
|---------------------|--|
| NMED Exhibit 1      | Resume of Robert Spillers  |
| NMED Exhibit 2      | Resume of Rita Bates   |
| NMED Exhibit 3      | Proposed Repeal of 20.2.85 NMAC - <i>Mercury Emission Standards and Compliance Schedules for Electrical Generating Units</i> |
| NMED Exhibit 4      | Written Testimony of Robert Spillers   |
| NMED Exhibit 5      | Statement of Reasons in EIB No. 06-15(R)   |
| NMED Exhibit 6      | <i>New Jersey v. EPA</i> , 517 F.3d 574 (D.C. Cir. 2008)   |
| NMED Exhibit 7      | Excerpts from 77 Fed. Reg. 9304 (Feb. 16, 2013) (Promulgation of MATS)   |
| NMED Exhibit 8      | Feb. 10, 2012 Letter from Secretary Martin to Regional Administrator Armendariz  |
| NMED Exhibit 9      | Mercury Emissions in New Mexico  |
| NMED Exhibit 10 A&B | Affidavits of Publication of Hearing Notice in New Mexico Register and Albuquerque Journal                                   |
| NMED Exhibit 11     | Management and Professional Experience of Ned Jerabek  |
| NMED Exhibit 12     | Proposed Order and Statement of Reasons  |

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



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## **Robert Spillers**

### **Education**

New Mexico Highlands University, Las Vegas, New Mexico 8/95-5/99  
Bachelor of Science, Environmental Science and Management

### **Employment/Experience**

**New Mexico Environment Department, Air Quality Bureau** Santa Fe, NM

Environmental Analyst

Environmental Scientist-Basic September 2005 – July 2008

Environmental Scientist-Operational July 2008 – September 2013

Environmental Scientist and Specialist-Advanced September 2013- Current

- Develop rules/guidance for unregulated sources that fall under the jurisdiction of the Bureau
  - Draft regulations
  - Collaborate with legal staff in drafting testimony for regulatory hearing
  - Prepare documents and participate in EIB hearing
  - Draft and file final rules with the NM State Records Center and Archives
- New Mexico Clean Diesel grant program
  - Project lead coordinating project communications and activities between NMED, EPA, vendor and grant recipients
  - Draft and amend grant application work plans for submittal to EPA
  - Provide oversight of grantees' diesel emissions reduction projects
  - Procurement and installation oversight of emission reduction technologies on eligible diesel-fueled fleets within the State
- Currently serving as the primary backup to the Bureau of Land Management Smoke Desk
- Use applicable Microsoft Office, and other computer based, applications for the execution of job duties
- Provide program support for Bureau activities including:
  - Develop comments for Environmental Assessments
  - Organize and conduct public outreach as it pertains to assigned projects
  - Participate in various workgroups/committees that benefit and ensure a superior work environment.
  - Provide assistance to other Bureau sections as needed

**Alex Safety Lane** Santa Fe, NM

Auto Technician October 1979 - February 2000

Shop Foreman February 2000 - September 2005

- Responsible for oversight, provided expert guidance and instruction to co-workers during the execution of their job duties to ensure a quality product
- Utilized relevant computer, and non computer, based diagnostic tools, equipment, and reference materials.
- Diagnosed and repaired computerized engine management systems, general repairs and completed recommended maintenance
- Communicated effectively with clients, co-workers, and management
- Fabricated necessary repairs that deviated from standard procedures
- This position required critical thinking, multitasking, and the ability to research, comprehend and implement relevant diagnostic instructions obtained from technical repair manuals

**USEPA Region II** Edison, NJ

Summer Internship May–August 1998

- Assisted in sample collection for the evaluation of lentic fresh water bodies
- Collected samples via helicopter for the New York Bight Helicopter Monitoring Program
- Conducted ambient monitoring activities for the Regional Environmental Monitoring and Assessment Program in the NY/NJ harbor estuary







# RITA BATES

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## EDUCATION

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HUMBOLDT STATE UNIVERSITY, ARCATA, CALIFORNIA  
*B.S., Biology, 1990. Minor in Botany, emphasis in Ecology.*

## EXPERIENCE

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STATE OF NEW MEXICO, ENVIRONMENT DEPARTMENT  
AIR QUALITY BUREAU, PLANNING & POLICY SECTION

*Section Chief, March 2005 – present*

*Program Manager (Natural Sciences Manager-2), March 2000 – March 2005*

*Environmental Specialist, December 1998 – March 2000*

*Environmental Scientist, August 1998 – December 1998*

The Planning & Policy section of the Air Quality Bureau is responsible for the control strategy, dispersion modeling, emission inventory and small business assistance programs in the Air Quality Bureau. The control strategy section of the Air Quality Bureau is responsible for preparing state implementation plans, policies, and regulations for air quality. The modeling section ensures that all air dispersion modeling analyses submitted to our agency are accurate and complete. The Small Business Assistance Program assists small businesses in meeting air quality regulatory requirements.

EMPIRE GROUP, LLC  
Empire, Nevada

*Environmental Coordinator, June 1996 – July 1998*

Empire Group, LLC is the parent company for several entities which own and operate a geothermal power plant, an onion and garlic dehydration plant, several ranches, and a garlic seed operation. In my position as environmental coordinator, I was responsible for permitting at all facilities.

JBR ENVIRONMENTAL CONSULTANTS, INC.  
Reno, Nevada

*Environmental Analyst IV, Reno Office Coordinator/Manager, July 1994 – July 1996*

*Environmental Analyst III, July 1993 – July 1994*

*Environmental Analyst I, June 1990 – July 1993*

As the manager of the Reno office, I supervised seven technical staff and one administrative employee. During my employment with JBR, I worked on and managed numerous NEPA, environmental permitting and baseline projects.







**TITLE 20 — ENVIRONMENTAL PROTECTION**  
**CHAPTER 2 — AIR QUALITY (STATEWIDE)**  
**PART 85 — MERCURY EMISSION STANDARDS AND COMPLIANCE SCHEDULES FOR**  
**————— ELECTRIC GENERATING UNITS**

**20.2.85.1 — ISSUING AGENCY.** Environmental Improvement Board.  
[20.2.85.1 NMAC — N, 06/15/07]

**20.2.85.2 — SCOPE.** All persons who currently operate or intend to construct or modify a coal-fired electric generating unit within the jurisdiction of the environmental improvement board.  
[20.2.85.2 NMAC — N, 06/15/07]

**20.2.85.3 — STATUTORY AUTHORITY.** Environmental Improvement Act, NMSA 1978, Section 74-1-8(A)(4), and Air Quality Control Act, NMSA 1978, Sections 74-2-1 et seq., including specifically, Section 74-2-5 (C)(2).  
[20.2.85.3 NMAC — N, 06/15/07]

**20.2.85.4 — DURATION.** Permanent.  
[20.2.85.4 NMAC — N, 06/15/07]

**20.2.85.5 — EFFECTIVE DATE.** June 15, 2007 except where a later date is cited at the end of a section.  
[20.2.85.5 NMAC — N, 06/15/07]

**20.2.85.6 — OBJECTIVE.** The objective of this part is to establish mercury emission limitations and compliance schedules for coal-fired electric generating units subject to this part.  
[20.2.85.6 NMAC — N, 06/15/07]

**20.2.85.7 — DEFINITIONS.** In addition to the terms defined in 20.2.2.7 NMAC (Definitions), as used in this part, the following definitions apply.

————— **A.** "Administrator" means the administrator of the United States environmental protection agency or the administrator's duly authorized representative.

————— **B.** "Alternate Hg designated representative" means, for a facility and each electric generating unit at the facility, the natural person who is authorized by the owners and operators of the facility and all such units at the facility in accordance with 20.2.85.102 NMAC through 20.2.85.106 NMAC, to act on behalf of the Hg designated representative in matters of this part.

————— **C.** "Automated data acquisition and handling system" or "DAHS" means that component of the continuous emission monitoring system (CEMS), or other emissions monitoring system approved for use under 20.2.85.110 NMAC through 20.2.85.117 NMAC, designed to interpret and convert individual output signals from pollutant concentration monitors, flow monitors, diluent gas monitors, and other component parts of the monitoring system to produce a continuous record of the measured parameters in the measurement units required under 20.2.85.110 NMAC through 20.2.85.117 NMAC.

————— **D.** "Boiler" means an enclosed fossil- or other fuel-fired combustion device used to produce heat and to transfer heat to recirculating water, steam, or other medium.

————— **E.** "Bottoming cycle cogeneration unit" means a cogeneration unit in which the energy input to the unit is first used to produce useful thermal energy and at least some of the reject heat from the useful thermal energy application or process is then used for electricity production.

————— **F.** "Coal" means any solid fuel classified as anthracite, bituminous, subbituminous, or lignite by the American society of testing and materials (ASTM) standard specification for classification of coals by rank D388-77, 90, 91, 95, 98a, or 99 (Reapproved 2004).

————— **G.** "Coal-derived fuel" means any fuel (whether in a solid, liquid, or gaseous state) produced by the mechanical, thermal, or chemical processing of coal.

————— **H.** "Coal-fired" means combusting any amount of coal or coal-derived fuel, alone or in combination with any amount of any other fuel, during any year.

————— **I.** "Cogeneration unit" means a stationary, coal-fired boiler or stationary, coal-fired combustion turbine with the following characteristics:

~~\_\_\_\_\_ (1) having equipment used to produce electricity and useful thermal energy for industrial, commercial, heating, or cooling purposes through the sequential use of energy; and~~

~~\_\_\_\_\_ (2) producing during the 12-month period starting on the date the unit first produces electricity and during any calendar year after which the unit first produces electricity:~~

~~\_\_\_\_\_ (a) for a topping-cycle cogeneration unit,~~

~~\_\_\_\_\_ (i) useful thermal energy not less than 5 percent of total energy output; and~~

~~\_\_\_\_\_ (ii) useful power that, when added to one-half of useful thermal energy produced, is not less than 42.5 percent of total energy input, if useful thermal energy produced is 15 percent or more of total energy output, or not less than 45 percent of total energy input, if useful thermal energy produced is less than 15 percent of total energy output; and~~

~~\_\_\_\_\_ (b) for a bottoming-cycle cogeneration unit, useful power not less than 45 percent of total energy input.~~

~~\_\_\_\_\_ J. "Combustion turbine" means:~~

~~\_\_\_\_\_ (1) an enclosed device comprising a compressor, a combustor, and a turbine and in which the flue gas resulting from the combustion of fuel in the combustor passes through the turbine, rotating the turbine; and~~

~~\_\_\_\_\_ (2) if the enclosed device under Paragraph (1) of this subsection is combined-cycle, any associated heat recovery steam generator and steam turbine.~~

~~\_\_\_\_\_ K. "Commence commercial operation", with regard to a unit serving a generator, means the following:~~

~~\_\_\_\_\_ (1) To have begun to produce steam, gas, or other heated medium used to generate electricity for sale or use, including test generation.~~

~~\_\_\_\_\_ (a) For a unit that is subject to this part on the date the unit commences commercial operation as defined in Paragraph (1) of this subsection and that subsequently undergoes a physical change (other than replacement of the unit by a unit at the same facility), such date shall remain the unit's date of commencement of commercial operation.~~

~~\_\_\_\_\_ (b) For a unit that is subject to this part on the date the unit commences commercial operation as defined in Paragraph (1) of this subsection and that is subsequently replaced by a unit at the same facility (e.g., repowered), the replacement unit shall be treated as a separate unit with a separate date for commencement of commercial operation as defined in Paragraph (1) or (2) of this subsection as appropriate.~~

~~\_\_\_\_\_ (2) For units that were not subject to this part as of the effective date of this part, a unit's date for commencement of commercial operation shall be the date on which the unit becomes subject to this part.~~

~~\_\_\_\_\_ (a) For a unit with a date for commencement of commercial operation as defined in Paragraph (2) of this subsection and that subsequently undergoes a physical change (other than replacement of the unit by a unit at the same facility), such date shall remain the unit's date of commencement of commercial operation.~~

~~\_\_\_\_\_ (b) For a unit with a date for commencement of commercial operation as defined in Paragraph (2) of this subsection and that is subsequently replaced by a unit at the same facility (e.g., repowered), the replacement unit shall be treated as a separate unit with a separate date for commencement of commercial operation as defined in Paragraph (1) or (2) of this subsection as appropriate.~~

~~\_\_\_\_\_ L. "Commence operation" means:~~

~~\_\_\_\_\_ (1) to have begun any mechanical, chemical, or electronic process, including, with regard to a unit, start-up of a unit's combustion chamber;~~

~~\_\_\_\_\_ (2) for a unit that undergoes a physical change (other than replacement of the unit by a unit at the same facility) after the date the unit commences operation as defined in Paragraph (1) of this subsection, such date shall remain the unit's date of commencement of operation; and~~

~~\_\_\_\_\_ (3) for a unit that is subsequently replaced by a unit at the same facility (e.g., repowered) after the date the unit commences operation as defined in Paragraph (1) of this subsection, the replacement unit shall be treated as a separate unit with a separate date for commencement of operation as defined in Paragraph (1) or (2) of this subsection as appropriate.~~

~~\_\_\_\_\_ M. "Common stack" means a single flue through which emissions from two or more units are exhausted.~~

~~\_\_\_\_\_ N. "Continuous emission monitoring system" or "CEMS" means the equipment required under this part to sample, analyze, measure, and provide, by means of readings recorded at least once every 15 minutes (using an automated data acquisition and handling system (DAHS)), a permanent record of mercury emissions, stack gas volumetric flow rate, stack gas moisture content, and oxygen or carbon dioxide concentration (as applicable), in a manner consistent with 40 CFR Part 75. The following systems are the principal types of CEMS required under this part:~~

\_\_\_\_\_ (1) a flow monitoring system, consisting of a stack flow rate monitor and an automated data acquisition and handling system and providing a permanent, continuous record of stack gas volumetric flow rate, in units of standard cubic feet per hour (scfh);

\_\_\_\_\_ (2) a mercury concentration monitoring system, consisting of a mercury pollutant concentration monitor and an automated data acquisition and handling system and providing a permanent, continuous record of mercury emissions in units of micrograms per dry standard cubic meter (ugm/dscm);

\_\_\_\_\_ (3) a moisture monitoring system, as defined in 40 CFR 75.11(b)(2) and providing a permanent, continuous record of the stack gas moisture content, in percent water;

\_\_\_\_\_ (4) a carbon dioxide monitoring system, consisting of a carbon dioxide concentration monitor (or an oxygen monitor plus suitable mathematical equations from which the carbon dioxide concentration is derived) and an automated data acquisition and handling system and providing a permanent, continuous record of carbon dioxide emissions, in percent carbon dioxide; and

\_\_\_\_\_ (5) an oxygen monitoring system, consisting of an oxygen concentration monitor and an automated data acquisition and handling system and providing a permanent, continuous record of oxygen, in percent oxygen.

\_\_\_\_\_ O. "Department" means the New Mexico environment department.

\_\_\_\_\_ P. "Electric generating unit" means a stationary coal-fired boiler or a stationary coal-fired combustion turbine that is subject to this part pursuant to 20.2.85.100 NMAC.

\_\_\_\_\_ Q. "Emissions" means air pollutants exhausted from a unit or facility into the atmosphere, as measured, recorded and reported to the administrator by the Hg designated representative and as determined by the administrator in accordance with 20.2.85.110 NMAC through 20.2.85.117 NMAC.

\_\_\_\_\_ R. "Escalante generating station" means the existing single coal-fired pressurized unit that generates approximately 250 gross megawatts of electricity and is identified as plant 87 by the United States department of energy, energy information administration.

\_\_\_\_\_ S. "Facility" means a stationary source that includes one or more electric generating units.

\_\_\_\_\_ T. "Generator" means a device that produces electricity.

\_\_\_\_\_ U. "Gross thermal energy" means, with regard to a cogeneration unit, useful thermal energy output plus, where such output is made available for an industrial or commercial process, any heat contained in condensate return or makeup water.

\_\_\_\_\_ V. "Maximum design heat input" means, starting from the initial installation of a unit, the maximum amount of fuel per hour (in British thermal units per hour) that a unit is capable of combusting on a steady-state basis as specified by the manufacturer of the unit, or, starting from the completion of any subsequent physical change in the unit resulting in a decrease in the maximum amount of fuel per hour (in British thermal units per hour) that a unit is capable of combusting on a steady-state basis, such decreased maximum amount as specified by the person conducting the physical change.

\_\_\_\_\_ W. "Heat input" means, with regard to a specified period of time, the product (in million British thermal units per time) of the gross calorific value of the fuel (in British thermal units per pound) divided by 1,000,000 British thermal units per million British thermal units and multiplied by the fuel feed rate into a combustion device (in pounds of fuel per time), as measured, recorded, and reported to the administrator by the Hg designated representative and determined by the administrator in accordance with 20.2.85.110 NMAC through 20.2.85.117 NMAC and excluding the heat derived from preheated combustion air, recirculated flue gases, or exhaust from other sources.

\_\_\_\_\_ X. "Heat input rate" means the amount of heat input (in million British thermal units) divided by unit operating time (in hours) or, with regard to a specific fuel, the amount of heat input attributed to the fuel (in million British thermal units) divided by the unit operating time (in hours) during which the unit combusts the fuel.

\_\_\_\_\_ Y. "Hg designated representative" means, for a facility and each electric generating unit at the facility, the natural person who is authorized by the owners and operators of the facility and all such units at the facility in accordance with 20.2.85.102 NMAC through 20.2.85.106 NMAC, to represent and legally bind each owner and operator in matters of this part.

\_\_\_\_\_ Z. "Life-of-the-unit, firm power contractual agreement" means a unit participation power sales agreement under which a utility or industrial customer reserves, or is entitled to receive, a specified amount or percentage of nameplate capacity and associated energy generated by any specified unit and pays its proportional amount of such unit's total costs, pursuant to a contract:

\_\_\_\_\_ (1) for the life of the unit;

\_\_\_\_\_ (2) for a cumulative term of no less than 30 years, including contracts that permit an election for early termination; or

~~(3) for a period of no less than 25 years or 70 percent of the economic useful life of the unit determined as of the time the unit is built, with option rights to purchase or release some portion of the nameplate capacity and associated energy generated by the unit at the end of the period.~~

~~AA. "Mercury emission limitation" or "limitation" means a maximum amount of mercury emissions that is allowed to be exhausted from a facility and electric generating units at such facility pursuant to 20.2.85.101 NMAC.~~

~~BB. "Monitoring system" means any monitoring system that meets the requirements of 20.2.85.110 NMAC through 20.2.85.117 NMAC, including a continuous emissions monitoring system, an alternative monitoring system, or an excepted monitoring system under 40 CFR Part 75.~~

~~CC. "Nameplate capacity" means, starting from the initial installation of a generator, the maximum electric generating output, in megawatts, that the generator is capable of producing on a steady state basis and during continuous operation (when not restricted by seasonal or other derates) as specified by the manufacturer of the generator or, starting from the completion of any subsequent physical change in the generator resulting in an increase in the maximum electric generating output, in megawatts, that the generator is capable of producing on a steady state basis and during continuous operation (when not restricted by seasonal or other derates), such increased maximum amount as specified by the person conducting the physical change.~~

~~DD. "New facility" means a facility that includes one or more electric generating units and commences operation on or after January 1, 2004.~~

~~EE. "New electric generating unit" means an electric generating unit commencing operation on or after January 1, 2004.~~

~~FF. "Operator" means any person who operates, controls, or supervises an electric generating unit or a facility that includes an electric generating unit and shall include, but not be limited to, any holding company, utility system, or plant manager of such electric generating unit or facility.~~

~~GG. "Ounce" means 2.84 times 10 to the seventh power micrograms. For purposes of this part, fractions of an ounce shall be rounded up to the next larger whole ounce.~~

~~HH. "Owner" means any of the following persons:~~

~~(1) any holder of any portion of the legal or equitable title in a facility or an electric generating unit;~~

~~(2) any holder of a leasehold interest in a facility or an electric generating unit; or~~

~~(3) any purchaser of power from a facility or an electric generating unit under a life of the unit, firm power contractual arrangement; provided that, unless expressly provided for in a leasehold agreement, owner shall not include a passive lessor, or a person who has an equitable interest through such lessor, whose rental payments are not based (either directly or indirectly) on the revenues or income from such facility or electric generating unit.~~

~~II. "Potential electric output capacity" means 33 percent of a unit's maximum design heat input, divided by 3,413 British thermal units per kilowatt-hour, divided by 1,000 kilowatt-hour per megawatt-hour, and multiplied by 8,760 hours per year.~~

~~JJ. "Reference method" means any direct test method of sampling and analyzing for an air pollutant as specified in 40 CFR 75.22.~~

~~KK. "Repowered" means, with regard to a unit, replacement of a coal-fired boiler with one of the following coal-fired technologies at the same source as the coal-fired boiler:~~

~~(1) atmospheric or pressurized fluidized bed combustion;~~

~~(2) integrated gasification combined cycle;~~

~~(3) magnetohydrodynamics;~~

~~(4) direct and indirect coal-fired turbines;~~

~~(5) integrated gasification fuel cells; or~~

~~(6) as determined by the administrator, a derivative of one or more of the technologies under Paragraphs (1) through (5) of this subsection and any other coal-fired technology capable of controlling multiple combustion emissions simultaneously with improved boiler or generation efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of January 1, 2005.~~

~~LL. "Sequential use of energy" means:~~

~~(1) for a topping-cycle cogeneration unit, the use of reject heat from electricity production in a useful thermal energy application or process; or~~

~~(2) for a bottoming-cycle cogeneration unit, the use of reject heat from useful thermal energy application or process in electricity production.~~

~~MM. "San Juan generating station" means the existing four coal-fired pressurized units that generate approximately 1,800 gross megawatts of electricity and is identified as plant 2451 by the United States department of energy, energy information administration.~~

~~\_\_\_\_\_ NN. "State" means:~~  
~~\_\_\_\_\_ (1) for purposes of referring to a governing entity, the state of New Mexico; or~~  
~~\_\_\_\_\_ (2) for purposes of referring to a geographic area, all geographic areas within the jurisdiction of the environmental improvement board.~~  
~~\_\_\_\_\_ OO. "Stationary source" means any building, structure, facility, or installation that emits or may emit an air pollutant.~~  
~~\_\_\_\_\_ PP. "Submit or serve" means to send or transmit a document, information, or correspondence to the person specified in accordance with the applicable regulation in person, by United States postal service, or by other means of dispatch or transmission and delivery. Compliance with any "submission" or "service" deadline shall be determined by the date of dispatch, transmission, or mailing and not the date of receipt.~~  
~~\_\_\_\_\_ QQ. "Topping cycle cogeneration unit" means a cogeneration unit in which the energy input to the unit is first used to produce useful power, including electricity, and at least some of the reject heat from the electricity production is then used to provide useful thermal energy.~~  
~~\_\_\_\_\_ RR. "Total energy input" means, with regard to a cogeneration unit, total energy of all forms supplied to the cogeneration unit, excluding energy produced by the cogeneration unit itself.~~  
~~\_\_\_\_\_ SS. "Total energy output" means, with regard to a cogeneration unit, the sum of useful power and useful thermal energy produced by the cogeneration unit.~~  
~~\_\_\_\_\_ TT. "Unit" means a stationary coal-fired boiler or a stationary coal-fired combustion turbine.~~  
~~\_\_\_\_\_ UU. "Unit operating day" means a calendar day in which a unit combusts any fuel.~~  
~~\_\_\_\_\_ VV. "Useful power" means, with regard to a cogeneration unit, electricity or mechanical energy made available for use, excluding any such energy used in the power production process (which process includes, but is not limited to, any on-site processing or treatment of fuel combusted at the unit and any on-site emission controls).~~  
~~\_\_\_\_\_ WW. "Useful thermal energy" means, with regard to a cogeneration unit, thermal energy that is:~~  
~~\_\_\_\_\_ (1) made available to an industrial or commercial process (not a power production process), excluding any heat contained in condensate return or makeup water;~~  
~~\_\_\_\_\_ (2) used in a heat application (e.g., space heating or domestic hot water heating); or~~  
~~\_\_\_\_\_ (3) used in a space cooling application (i.e., thermal energy used by an absorption chiller).~~  
~~\_\_\_\_\_ XX. "Utility power distribution system" means the portion of an electricity grid owned or operated by a utility and dedicated to delivering electricity to customers.~~  
~~[20.2.85.7 NMAC - N, 06/15/07]~~

~~20.2.85.8 — DOCUMENTS. Documents incorporated and cited in this part may be viewed at the New Mexico Environment Department, Air Quality Bureau, 2048 Galisteo Street, Santa Fe, NM 87505.~~  
~~[20.2.85.8 NMAC - N, 06/15/07]~~

~~20.2.85.9 — SEVERABILITY. If any provision of this part, or the application of such provision to any person or circumstance, is held invalid, the remainder of this part, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.~~  
~~[20.2.85.9 NMAC - N, 06/15/07]~~

~~20.2.85.10 — CONSTRUCTION. This part shall be liberally construed to carry out its purpose.~~  
~~[20.2.85.10 NMAC - N, 06/15/07]~~

~~20.2.85.11 — SAVINGS CLAUSE. Repeal or supersession of prior versions of this part shall not affect any administrative or judicial action initiated under those prior versions.~~  
~~[20.2.85.11 NMAC - N, 06/15/07]~~

~~20.2.85.12 — COMPLIANCE WITH OTHER REGULATIONS. Compliance with this part does not relieve a person from the responsibility to comply with any other applicable federal, state, or local regulations.~~  
~~[20.2.85.12 NMAC - N, 06/15/07]~~

~~20.2.85.13 — LIMITATION OF DEFENSE. The existence of a valid permit under this part shall not constitute a defense to a violation of any section of this part, except the requirement for obtaining a permit.~~  
~~[20.2.85.13 NMAC - N, 06/15/07]~~

~~20.2.85.14 to 20.2.85.99 — [RESERVED]~~

~~20.2.85.100 — APPLICABILITY.~~

~~A. The following units, and any facility that includes one or more such units, shall be subject to the requirements of this part.~~

~~(1) Except as provided in Subsections B and C of this section, a stationary, coal-fired boiler or stationary, coal-fired combustion turbine in the state serving at any time, since the later of November 15, 1990 or the start-up of the unit's combustion chamber, a generator with nameplate capacity of more than 25 megawatts electric producing electricity for sale.~~

~~(2) If a stationary boiler or stationary combustion turbine that, under paragraph (1) of this subsection, is not an electric generating unit begins to combust coal or coal-derived fuel or to serve a generator with nameplate capacity of more than 25 megawatts electric producing electricity for sale, the unit shall become an electric generating unit as provided in Paragraph (1) of this subsection on the first date on which it both combusts coal or coal-derived fuel and serves such generator.~~

~~B. A unit that meets the requirements set forth in Paragraph (1) of this subsection shall not be an electric generating unit.~~

~~(1) A unit that is an electric generating unit under Paragraph (1) or (2) of Subsection A of this section:~~

~~(a) qualifying as a cogeneration unit during the 12-month period starting on the date the unit first produces electricity and continuing to qualify as a cogeneration unit; and~~

~~(b) not serving at any time, since the later of November 15, 1990 or the start-up of the unit's combustion chamber, a generator with nameplate capacity of more than 25 megawatts electric supplying in any calendar year more than one-third of the unit's potential electric output capacity or 219,000 megawatt-hours, whichever is greater, to any utility power distribution system for sale.~~

~~(2) If a unit qualifies as a cogeneration unit during the 12-month period starting on the date the unit first produces electricity and meets the requirements of Paragraph (1) of this subsection for at least one calendar year, but subsequently no longer meets all such requirements, the unit shall become an electric generating unit starting on the earlier of January 1 after the first calendar year during which the unit first no longer qualifies as a cogeneration unit or January 1 after the first calendar year during which the unit no longer meets the requirements of Subparagraph (b) of Paragraph (1) of this subsection.~~

~~C. A "solid waste incineration unit" as defined in Clean Air Act Section 129(g)(1) combusting "municipal waste" as defined in Clean Air Act Section 129(g)(5) shall not be an electric generating unit if it is subject to one of the following rules:~~

~~(1) 20.2.77 NMAC, which incorporates by reference the following:~~

~~(a) 40 CFR 60 Subpart Cb, "Emissions Guidelines and Compliance Times for Large Municipal Waste Combustors That Are Constructed On or Before September 20, 1994";~~

~~(b) 40 CFR 60 Subpart Eb, "Standards of Performance for Large Municipal Waste Combustors for Which Construction is Commenced After September 20, 1994 or for Which Modification or Reconstruction is Commenced After June 19, 1996";~~

~~(c) 40 CFR 60 Subpart AAAA, "Standards of Performance for Small Municipal Waste Combustors for Which Construction is Commenced After August 30, 1999 or for Which Modification or Reconstruction is Commenced After June 6, 2001";~~

~~(d) 40 CFR 60 Subpart BBBB, "Emission Guidelines and Compliance Times for Small Municipal Waste Combustion Units Constructed On or Before August 30, 1999"; or~~

~~(2) 40 CFR 62 Subpart FFF, "Federal Plan Requirements for Large Municipal Waste Combustors Constructed On or Before September 20, 1994"; or~~

~~(3) 40 CFR 62 Subpart JJJ, "Federal Plan Requirements for Small Municipal Waste Combustion Units Constructed On or Before August 30, 1999".~~

~~[20.2.85.100 NMAC - N, 06/15/07]~~

~~20.2.85.101 — MERCURY EMISSION LIMITATIONS.~~

~~A. The following are the amounts of the state's annual allowable mercury emissions from electric generating units, in ounces of mercury per calendar year:~~

~~(1) for calendar years 2010 through 2017, 9,568 ounces per year; and~~

~~(2) for calendar year 2018 and each calendar year thereafter, 3,776 ounces per year.~~

~~B. Beginning in calendar year 2010, the state's annual allowable mercury emissions from electric generating units shall apply as the following facility-wide mercury emission limitations.~~

~~\_\_\_\_\_ (1) For the calendar years 2010 through 2017:~~

~~\_\_\_\_\_ (a) San Juan generating station shall emit no more than 7,808 ounces of mercury per calendar year; and~~

~~\_\_\_\_\_ (b) Escalante generating station shall emit no more than 1,280 ounces of mercury per calendar year; and~~

~~\_\_\_\_\_ (c) new facilities and any other facilities except San Juan and Escalante generating stations, in aggregate, shall emit no more than 480 ounces of mercury per calendar year.~~

~~\_\_\_\_\_ (2) For the calendar year 2018 and each calendar year thereafter:~~

~~\_\_\_\_\_ (a) San Juan generating station shall emit no more than 3,323 ounces of mercury per calendar year; and~~

~~\_\_\_\_\_ (b) Escalante generating station shall emit no more than 340 ounces of mercury per calendar year; and~~

~~\_\_\_\_\_ (c) new facilities and any other facilities except San Juan and Escalante generating stations, in aggregate, shall emit no more than 113 ounces of mercury per calendar year.~~

~~[20.2.85.101 NMAC - N, 06/15/07]~~

~~**20.2.85.102 — AUTHORITY AND RESPONSIBILITIES OF Hg DESIGNATED REPRESENTATIVES.**~~

~~\_\_\_\_\_ A. Except as provided under 20.2.85.103 NMAC, each facility, including all electric generating units at the facility, shall have one and only one Hg designated representative, with regard to all matters under this part concerning the facility or any electric generating unit at the facility.~~

~~\_\_\_\_\_ B. The Hg designated representative of the facility shall be selected by an agreement binding on the owners and operators of the facility and all electric generating units at the facility and shall act in accordance with the certification statement in 20.2.85.105 NMAC.~~

~~\_\_\_\_\_ C. Upon receipt by the administrator of a complete certificate of representation under 20.2.85.105 NMAC, the Hg designated representative of the facility shall represent and, by his or her representations, actions, inactions, or submissions, legally bind each owner and operator of the facility represented and each electric generating unit at the facility in all matters pertaining to this part, notwithstanding any agreement between the Hg designated representative and such owners and operators. The owners and operators shall be bound by any decision or order issued to the Hg designated representative by the department, the administrator, or a court regarding the facility or electric generating unit.~~

~~\_\_\_\_\_ D. No permit will be issued pursuant to 20.2.85.108 NMAC and, no emissions data reports will be accepted for a electric generating unit at a facility, until the administrator has received a complete certificate of representation under 20.2.85.105 NMAC for a Hg designated representative of the facility and the electric generating units at the facility.~~

~~\_\_\_\_\_ E. Each submission under this part shall be submitted, signed, and certified by the Hg designated representative for each facility on behalf of which the submission is made. Each such submission shall include the following certification statement by the Hg designated representative: "I am authorized to make this submission on behalf of the owners and operators of the facility or electric generating units for which the submission is made. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment."~~

~~\_\_\_\_\_ F. The department and the administrator will accept or act on a submission made on behalf of owner or operators of a facility or an electric generating unit only if the submission has been made, signed, and certified in accordance with Subsection E of this section.~~

~~[20.2.85.102 NMAC - N, 06/15/07]~~

~~**20.2.85.103 — ALTERNATE Hg DESIGNATED REPRESENTATIVE.**~~

~~\_\_\_\_\_ A. A certificate of representation under 20.2.85.105 NMAC may designate one and only one alternate Hg designated representative, who may act on behalf of the Hg designated representative. The agreement by which the alternate Hg designated representative is selected shall include a procedure for authorizing the alternate Hg designated representative to act in lieu of the Hg designated representative.~~

~~\_\_\_\_\_ B. \_\_\_\_\_ Upon receipt by the administrator of a complete certificate of representation under 20.2.85.105 NMAC, any representation, action, inaction, or submission by the alternate Hg designated representative shall be deemed to be a representation, action, inaction, or submission by the Hg designated representative.~~

~~\_\_\_\_\_ C. \_\_\_\_\_ Except in this section and 20.2.85.7 NMAC, Subsections A and D of 20.2.85.102 NMAC, 20.2.85.104 NMAC, and 20.2.85.105 NMAC, whenever the term "Hg designated representative" is used in this part, the term shall be construed to include the Hg designated representative or any alternate Hg designated representative.~~

~~[20.2.85.103 NMAC - N, 06/15/07]~~

~~**20.2.85.104 — CHANGING Hg DESIGNATED REPRESENTATIVE AND ALTERNATE Hg DESIGNATED REPRESENTATIVE; CHANGES IN OWNERS AND OPERATORS.**~~

~~\_\_\_\_\_ A. \_\_\_\_\_ The Hg designated representative may be changed at any time upon receipt by the administrator of a superseding complete certificate of representation under 20.2.85.105 NMAC. Notwithstanding any such change, all representations, actions, inactions, and submissions by the previous Hg designated representative before the time and date when the administrator receives the superseding certificate of representation shall be binding on the new Hg designated representative and the owners and operators of the facility and the electric generating units at the facility.~~

~~\_\_\_\_\_ B. \_\_\_\_\_ The alternate Hg designated representative may be changed at any time upon receipt by the administrator of a superseding complete certificate of representation under 20.2.85.105 NMAC. Notwithstanding any such change, all representations, actions, inactions, and submissions by the previous alternate Hg designated representative before the time and date when the administrator receives the superseding certificate of representation shall be binding on the new alternate Hg designated representative and the owners and operators of the facility and the electric generating units at the source.~~

~~\_\_\_\_\_ C. \_\_\_\_\_ In the event a new owner or operator of a facility or an electric generating unit is not included in the list of owners and operators in the certificate of representation under 20.2.85.105 NMAC, such new owner or operator shall be deemed to be subject to and bound by the certificate of representation, the representations, actions, inactions, and submissions of the Hg designated representative and any alternate Hg designated representative of the facility or electric generating unit, and the decisions and orders of the department, the administrator, or a court, as if the new owner or operator were included in such list.~~

~~\_\_\_\_\_ D. \_\_\_\_\_ Within 30 days following any change in the owners and operators of a facility or an electric generating unit, including the addition of a new owner or operator, the Hg designated representative or any alternate Hg designated representative shall submit a revision to the certificate of representation under 20.2.85.105 NMAC amending the list of owners and operators to include the change.~~

~~[20.2.85.104 NMAC - N, 06/15/07]~~

~~**20.2.85.105 — CERTIFICATE OF REPRESENTATION.**~~

~~\_\_\_\_\_ A. \_\_\_\_\_ A complete certificate of representation for a Hg designated representative or an alternate Hg designated representative shall include the following elements in a format prescribed by the administrator:~~

~~\_\_\_\_\_ (1) Identification of the facility, and each electric generating unit at the facility, for which the certificate of representation is submitted.~~

~~\_\_\_\_\_ (2) The name, address, e-mail address (if any), telephone number, and facsimile transmission number (if any) of the Hg designated representative and any alternate Hg designated representative.~~

~~\_\_\_\_\_ (3) A list of the owners and operators of the facility and of each electric generating unit at the facility.~~

~~\_\_\_\_\_ (4) The following certification statements by the Hg designated representative and any alternate Hg designated representative.~~

~~\_\_\_\_\_ (a) "I certify that I was selected as the Hg designated representative or alternate Hg designated representative, as applicable, by an agreement binding on the owners and operators of the facility and each electric generating unit at the facility."~~

~~\_\_\_\_\_ (b) "I certify that I have all the necessary authority to carry out my duties and responsibilities under 20.2.85 NMAC on behalf of the owners and operators of the facility and of each electric generating unit at the facility and that each such owner and operator shall be fully bound by my representations, actions, inactions, or submissions."~~

~~\_\_\_\_\_ (c) "I certify that the owners and operators of the source and of each electric generating unit at the facility shall be bound by any order issued to me by the administrator, the department, or a court regarding the source or unit."~~

~~\_\_\_\_\_ (d) "Where there are multiple holders of a legal or equitable title to, or a leasehold interest in, an electric generating unit, or where a customer purchases power from a electric generating unit under a life of the unit, firm power contractual arrangement, I certify that: I have given a written notice of my selection as the 'Hg designated representative' or 'alternate Hg designated representative,' as applicable, and of the agreement by which I was selected to each owner and operator of the facility and of each electric generating unit at the facility."~~

~~\_\_\_\_\_ (5) The signature of the Hg designated representative and any alternate Hg designated representative and the dates signed.~~

~~\_\_\_\_\_ B. Unless otherwise required by the department or the administrator, documents of agreement referred to in the certificate of representation shall not be submitted to the department or the administrator. Neither the department nor the administrator shall be under any obligation to review or evaluate the sufficiency of such documents, if submitted.~~

~~[20.2.85.105 NMAC - N, 06/15/07]~~

#### **20.2.85.106 — OBJECTIONS CONCERNING Hg DESIGNATED REPRESENTATIVE.**

~~\_\_\_\_\_ A. Once a complete certificate of representation under 20.2.85.105 NMAC has been submitted and received, the department and the administrator will rely on the certificate of representation unless and until a superseding complete certificate of representation under 20.2.85.105 NMAC is received by the administrator.~~

~~\_\_\_\_\_ B. Except as provided in Subsection A or B of 20.2.85.104 NMAC, no objection or other communication submitted to the department or the administrator concerning the authorization, or any representation, action, inaction, or submission, of the Hg designated representative shall affect any representation, action, inaction, or submission of the Hg designated representative or the finality of any decision or order by the department or the administrator under this part.~~

~~\_\_\_\_\_ C. Neither the department nor the administrator will adjudicate any private legal dispute concerning the authorization or any representation, action, inaction, or submission of any Hg designated representative.~~

~~[20.2.85.106 NMAC - N, 06/15/07]~~

#### **20.2.85.107 — LIABILITY.**

~~\_\_\_\_\_ A. Any provision of this part that applies to a facility or the Hg designated representative of a facility shall also apply to the owners and operators of such facility and of the electric generating units at the facility.~~

~~\_\_\_\_\_ B. Any provision of this part that applies to an electric generating unit or the Hg designated representative of an electric generating unit shall also apply to the owners and operators of such electric generating unit.~~

~~[20.2.85.107 NMAC - N, 06/15/07]~~

#### **20.2.85.108 — PERMIT REQUIREMENTS.**

~~\_\_\_\_\_ A. By January 1, 2010, each facility with one or more electric generating units and subject to this part shall obtain facility wide mercury emission limitations as part of the facility's operating permit issued by the department under 20.2.70 NMAC. Facility wide mercury emission limitations shall not exceed the facility wide mercury emission limitations under 20.2.85.101 NMAC.~~

~~\_\_\_\_\_ B. Prior to a new electric generating unit commencing operation at a facility already subject to this part, the Hg designated representative shall obtain for the facility a modified operating permit under 20.2.70 NMAC, including a facility wide mercury emission limitation sufficient to permit operation of the new electric generating unit. Facility wide mercury emission limitations shall not exceed the facility wide mercury emission limitations under 20.2.85.101 NMAC.~~

~~\_\_\_\_\_ C. Prior to commencement of operation of a new facility and any other facility except San Juan and Escalante generating stations, the Hg designated representative shall obtain for the new facility a construction permit under 20.2.72 NMAC and an operating permit under 20.2.70 NMAC. Each permit shall include a mercury emission limitation for units at the facility. As part of the permit application under 20.2.72 NMAC, the Hg designated representative shall request for the facility a facility wide mercury emission limitation, in ounces of mercury per calendar year, not to exceed the unrequested and available applicable aggregate new facility mercury emission limitation in accordance with 20.2.85.101 NMAC. In no case shall mercury emission limitations requested for new facilities, in aggregate, exceed the applicable mercury emission limitation for new facilities in 20.2.85.101 NMAC. The department shall subtract a new facility's facility wide mercury emission limitation as permitted from the available applicable aggregate new facility mercury emission limitation under 20.2.85.101 NMAC. The department shall keep permanent records of the available and permitted new facility mercury emission limitations in each calendar year.~~

~~D. Each application pursuant to this section for a construction permit under 20.2.72 NMAC and a new or modified operating permit under 20.2.70 NMAC shall include the following information:~~

- ~~(1) identification of the facility and each electric generating unit at the facility; and~~
- ~~(2) identification of the mercury emission limitations for the calendar years 2010 through 2017 and for the calendar year 2018 and each calendar year thereafter, as applicable and in accordance with 20.2.85.101 NMAC.~~

~~[20.2.85.108 NMAC - N, 06/15/07]~~

~~**20.2.85.109 PROHIBITIONS ON MERCURY ALLOWANCES AND MERCURY ALLOCATIONS.**~~

~~Mercury emission limitations described in this part shall not qualify as mercury allowances or mercury allocations under any allowance system approved under 40 CFR 60.24(h)(6).~~

~~[20.2.85.109 NMAC - N, 06/15/07]~~

~~**20.2.85.110 COMPLIANCE WITH 40 CFR PART 75.** Facilities subject to this part shall comply with all requirements of 40 CFR Part 75 concerning determinations of mercury mass emissions.~~

~~[20.2.85.110 NMAC - N, 06/15/07]~~

~~**20.2.85.111 GENERAL REQUIREMENTS FOR MONITORING AND REPORTING.** The owner and operator, and to the extent applicable, the Hg designated representative, of an electric generating unit shall comply with the monitoring, recordkeeping, and reporting requirements as provided in this part and 40 CFR 75 Subpart I. For purposes of complying with such requirements, the definitions in 20.2.85.7 NMAC and in 40 CFR 72 shall apply, and the terms "affected unit" and "continuous emission monitoring system" (or "CEMS") contained in 40 CFR 75 Subpart I shall be deemed to refer to the terms "electric generating unit" and "continuous emission monitoring system" (or "CEMS") respectively, as defined in 20.2.85.7 NMAC. The owner or operator of a unit that is not an electric generating unit as defined in this part but that is monitored under 40 CFR 75.82(b)(2)(i) shall comply with the same monitoring, recordkeeping, and reporting requirements as an electric generating unit.~~

~~A. Requirements for installation, certification, and data accounting. The owner or operator of each electric generating unit shall:~~

~~(1) install all monitoring systems required under this part for monitoring mercury mass emissions and individual unit heat input (including all systems required to monitor mercury concentration, stack gas moisture content, stack gas flow rate, and carbon dioxide or oxygen concentration, as applicable) in accordance with 40 CFR 75.81 and 40 CFR 75.82;~~

~~(2) successfully complete all certification tests required under this part and meet all other requirements of this part and 40 CFR 75 Subpart I applicable to the monitoring systems under Paragraph (1) of this subsection;~~

~~(3) record and report the data from the monitoring systems under Paragraph (1) of this subsection in accordance with 40 CFR 75; and~~

~~(4) quality assure the data from the monitoring systems under Paragraph (1) of this subsection in accordance with 40 CFR 75.~~

~~B. Compliance deadlines. The owner or operator shall meet the monitoring system certification and other requirements of this section on or before the following dates.~~

~~(1) For the owner or operator of an electric generating unit that commences commercial operation before July 1, 2008, by January 1, 2009.~~

~~(2) For the owner or operator of an electric generating unit that commences commercial operation on or after July 1, 2008, by the later of the following dates:~~

~~(a) January 1, 2009; or~~

~~(b) 90 unit operating days or 180 calendar days, whichever occurs first, after the date on which the unit commences commercial operation.~~

~~(3) For the owner or operator of an electric generating unit for which construction of a new stack or flue or installation of add-on mercury emission controls, a flue gas desulfurization system, a selective catalytic reduction system, or a compact hybrid particulate collector system is completed after the applicable deadline under Paragraph (1) or (2) of this subsection, by 90 unit operating days or 180 calendar days, whichever occurs first, after the date on which emissions first exit to the atmosphere through the new stack or flue, add-on mercury emissions controls, flue gas desulfurization system, selective catalytic reduction system, or compact hybrid particulate collector system.~~

~~C. Reporting data.~~

~~(1) Except as provided in Paragraph (2) of this subsection, the owner or operator of an electric generating unit that does not meet the applicable compliance date set forth in Subsection B of this section for any monitoring system under Paragraph (1) of Subsection A of this section shall, for each such monitoring system, determine, record, and report maximum potential (or, as appropriate, minimum potential) values for mercury concentration, stack gas flow rate, stack gas moisture content, and any other parameters required to determine mercury mass emissions and heat input in accordance with 40 CFR 75.80(g).~~

~~(2) The owner or operator of an electric generating unit that does not meet the applicable compliance date set forth in Paragraph (3) of Subsection B of this section for any monitoring system under Paragraph (1) of Subsection A of this section shall, for each such monitoring system, determine, record, and report substitute data using the applicable missing data procedures in 40 CFR 75 Subpart D, in lieu of the maximum potential (or, as appropriate, minimum potential) values, for a parameter if the owner or operator demonstrates that there is continuity between the data streams for that parameter before and after the construction or installation under Paragraph (3) of Subsection B of this section.~~

~~**D. Prohibitions.**~~

~~(1) No owner or operator of an electric generating unit shall use any alternative monitoring system, alternative reference method, or any other alternative to any requirement of this part without having obtained prior written approval in accordance with 20.2.85.116 NMAC.~~

~~(2) No owner or operator of an electric generating unit shall operate the unit so as to discharge, or allow to be discharged, mercury emissions to the atmosphere without accounting for all such emissions in accordance with the applicable provisions of this part and 40 CFR 75 Subpart I.~~

~~(3) No owner or operator of an electric generating unit shall disrupt the continuous emission monitoring system, any portion thereof, or any other approved emission monitoring method, and thereby avoid monitoring and recording mercury mass emissions discharged into the atmosphere, except for periods of recertification or periods when calibration, quality assurance testing, or maintenance is performed in accordance with the applicable provisions of this part and 40 CFR 75 Subpart I.~~

~~(4) No owner or operator of an electric generating unit shall retire or permanently discontinue use of the continuous emission monitoring system, any component thereof, or any other approved monitoring system under this part and 40 CFR Part 75, except under any one of the following circumstances:~~

~~(a) the owner or operator is monitoring emissions from the electric generating unit with another certified monitoring system approved, in accordance with the applicable provisions of this part and 40 CFR 75 Subpart I, by the department for use at that unit that provides emission data for the same pollutant or parameter as the retired or discontinued monitoring system; or~~

~~(b) the Hg designated representative submits notification of the date of certification testing of a replacement monitoring system for the retired or discontinued monitoring system in accordance with 20.2.85.112 NMAC.~~

~~[20.2.85.111 NMAC - N, 06/15/07]~~

~~**20.2.85.112 INITIAL CERTIFICATION AND RECERTIFICATION PROCEDURES.**~~

~~A. The owner or operator of an electric generating unit shall be exempt from the initial certification requirements of this section for a monitoring system under Paragraph (1) of Subsection A of 20.2.85.111 NMAC if the following conditions are met.~~

~~(1) The monitoring system has been previously certified in accordance with 40 CFR Part 75.~~

~~(2) For continuous emission monitoring systems, the applicable quality assurance and quality control requirements of 40 CFR 75.21 and 40 CFR 75 Appendix B are fully met for the certified monitoring system described in Paragraph (1) of Subsection A of this section.~~

~~(3) For sorbent trap monitoring systems, the applicable quality assurance and quality control requirements of 40 CFR 75.15, 40 CFR 75 Appendix A Section 6.5.7, 40 CFR 75 Appendix B Sections 1.5 and 2.3, and 40 CFR 75 Appendix K are fully met for the certified monitoring system.~~

~~B. The recertification provisions of this section shall apply to a monitoring system which is exempt from initial certification requirements under Subsection A of this section.~~

~~C. Except as provided in Subsection A of this section, the owner or operator of an electric generating unit shall comply with the following initial certification and recertification procedures for a continuous monitoring system (e.g., a continuous emission monitoring system and sorbent trap monitoring system under 40 CFR 75.15). The owner or operator of an electric generating unit that qualifies to use the mercury low mass emissions excepted monitoring methodology under 40 CFR 75.81(b) that also qualifies to use an alternative monitoring system under 40 CFR 75 Subpart E shall comply with the procedures in Subsections D or E of this section respectively.~~

~~(1) Requirements for initial certification. The owner or operator shall ensure that each monitoring system under Paragraph (1) of Subsection A of 20.2.85.111 NMAC (including the automated data acquisition and handling system) successfully completes all of the initial certification testing required under 40 CFR 75.20 by the applicable deadline in Subsection B of 20.2.85.111 NMAC. In addition, whenever the owner or operator installs a monitoring system to meet the requirements of this part and 40 CFR Part 75 in a location where no such monitoring system was previously installed, initial certification in accordance with 40 CFR 75.20 is required.~~

~~(2) Requirements for recertification.~~

~~(a) Whenever the owner or operator makes a replacement, modification, or change in any certified continuous emission monitoring system under Paragraph (1) of Subsection A of 20.2.85.111 NMAC or sorbent trap monitoring system under 40 CFR 75.15 that may significantly affect the ability of the system to accurately measure or record mercury mass emissions or heat input rate or to meet the quality assurance and quality control requirements of 40 CFR 75.21 or 40 CFR appendix B, the owner or operator shall recertify the monitoring system in accordance with 40 CFR 75.20(b).~~

~~(b) Whenever the owner or operator makes a replacement, modification, or change to the flue gas handling system or the unit's operation that may significantly change the stack flow or concentration profile, the owner or operator shall recertify each continuous emission monitoring system, and each sorbent trap monitoring system under 40 CFR 75.15, whose accuracy is potentially affected by the change, in accordance with 40 CFR 75.20(b). Examples of changes to a continuous emission monitoring system that require recertification include replacement of the analyzer, complete replacement of an existing continuous emission monitoring system, or change in location or orientation of the sampling probe or site.~~

~~(3) Approval process for initial certification and recertification. Subparagraphs (a) through (d) of this paragraph apply to both initial certification and recertification of a continuous monitoring system under Paragraph (1) of Subsection A of 20.2.85.111 NMAC. For recertifications, apply the word "recertification" instead of the words "certification" and "initial certification" and apply the word "recertified" instead of the word "certified," and follow the procedures in 40 CFR 75.20(b)(5) in lieu of the procedures in Paragraph (2) of this section.~~

~~(a) Notification of certification. The Hg designated representative of an electric generating unit shall submit to the department, the administrator's region 6 office, and the administrator written notice of the dates of certification testing, in accordance with 20.2.85.114 NMAC.~~

~~(b) Certification application. The Hg designated representative of an electric generating unit shall submit to the department a certification application for each monitoring system. A complete certification application shall include the information specified in 40 CFR 75.63.~~

~~(c) Provisional certification date. The provisional certification date for a monitoring system shall be determined in accordance with 40 CFR 75.20(a)(3). A provisionally certified monitoring system may be used under this part for a period not to exceed 120 days after receipt by the department of the complete certification application for the monitoring system under Subparagraph (b) of this paragraph. Data measured and recorded by the provisionally certified monitoring system, in accordance with the requirements of 40 CFR 75, will be considered valid quality assured data (retroactive to the date and time of provisional certification), provided that the department does not invalidate the provisional certification by issuing a notice of disapproval within 120 days of the date of receipt of the complete certification application by the state.~~

~~(d) Certification application approval process. The department will issue a written notice of approval or disapproval of the certification application to the owner or operator within 120 days of receipt of the complete certification application under Subparagraph (b) of this paragraph. In the event the department does not issue such a notice within such 120-day period, each monitoring system that meets the applicable performance requirements of 40 CFR Part 75 and is included in the certification application will be deemed certified for use under this part.~~

~~(i) Approval notice. If the certification application is complete and shows that each monitoring system meets the applicable performance requirements of 40 CFR Part 75, then the department will issue a written notice of approval of the certification application within 120 days of receipt.~~

~~(ii) Incomplete application notice. If the certification application is not complete, then the department will issue a written notice of incompleteness that sets a reasonable date by which the Hg designated representative of an electric generating unit must submit the additional information required to complete the certification application. If the Hg designated representative of an electric generating unit does not comply with the notice of incompleteness by the specified date, then the department may issue a notice of disapproval under this subparagraph. The 120-day review period shall not begin before receipt of a complete certification application.~~

~~(iii) Disapproval notice. If the certification application shows that any monitoring system does not meet the performance requirements of 40 CFR Part 75 or if the certification application is~~

incomplete and the requirement for disapproval under this subparagraph is met, then the department will issue a written notice of disapproval of the certification application. Upon issuance of such notice of disapproval, the provisional certification is invalidated by the department and the data measured and recorded by each uncertified monitoring system shall not be considered valid quality assured data beginning with the date and hour of provisional certification (as defined under 40 CFR 75.20(a)(3)). The owner or operator shall follow the procedures for loss of certification in Paragraph (4) of this subsection for each monitoring system that is disapproved for initial certification.

~~(iv) Audit decertification. The department may issue a notice of disapproval of the certification status of a monitor in accordance with Subsection B of 20.2.85.113 NMAC.~~

~~(4) Procedures for loss of certification. If the department issues a notice of disapproval of a certification application or a notice of disapproval of certification status under subparagraph d of Paragraph (3) of this subsection, then:~~

~~(a) the owner or operator shall substitute the following values, for each disapproved monitoring system, for each hour of electric generating unit operation during the period of invalid data specified under 40 CFR 75.20(a)(4)(iii), or 40 CFR 75.21(e) and continuing until the applicable date and hour specified under 40 CFR 75.20(a)(5)(i):~~

~~(i) for a disapproved mercury pollutant concentration monitor and disapproved flow monitor, respectively, the maximum potential concentration of mercury and the maximum potential flow rate, as defined in 40 CFR 75 Appendix A, Sections 2.1.7.1 and 2.1.4.1;~~

~~(ii) for a disapproved moisture monitoring system and disapproved diluent gas monitoring system, respectively, the minimum potential moisture percentage and either the maximum potential carbon dioxide concentration or the minimum potential oxygen concentration (as applicable), as defined in 40 CFR 75 Appendix A, Sections 2.1.5, 2.1.3.1, and 2.1.3.2;~~

~~(iii) for a disapproved sorbent trap monitoring system under 40 CFR 75.15 and disapproved flow monitor, respectively, the maximum potential concentration of mercury and maximum potential flow rate, as defined in 40 CFR 75 Appendix A, Sections 2.1.7.1 and 2.1.4.1;~~

~~(b) the Hg designated representative of an electric generating unit shall submit a notification of certification retest dates and a new certification application in accordance with Subparagraphs (a) and (b) of Paragraph (3) of this subsection;~~

~~(e) the owner or operator shall repeat all certification tests or other requirements that were failed by the monitoring system, as indicated in the department's notice of disapproval, no later than 30 unit operating days after the date of issuance of the notice of disapproval.~~

~~D. Initial certification and recertification procedures for units using the mercury low mass emission excepted methodology under 40 CFR 75.81(b). The owner or operator of an electric generating unit qualified to use the mercury low mass emissions excepted methodology under 40 CFR 75.81(b) shall meet the applicable certification and recertification requirements in 40 CFR 75.81(c) through (f).~~

~~E. Certification/recertification procedures for alternative monitoring systems. The Hg designated representative of each electric generating unit for which the owner or operator intends to use an alternative monitoring system approved by the administrator under 40 CFR 75 Subpart E shall comply with the applicable notification and application procedures of 40 CFR 75.20(f).~~

~~[20.2.85.112 NMAC - N, 06/15/07]~~

### **20.2.85.113 — MISSING DATA PROCEDURES AND OUT OF CONTROL PERIODS FOR CONTINUOUS MONITORING SYSTEMS.**

~~A. Whenever any monitoring system fails to meet the quality assurance and quality control requirements or data validation requirements of 40 CFR Part 75, data shall be substituted using the applicable missing data procedures in 40 CFR 75 Subpart D.~~

~~B. Audit decertification. Whenever both an audit of a monitoring system and a review of the initial certification or recertification application reveal that any monitoring system should not have been certified or recertified because it did not meet a particular performance specification or other requirement under 20.2.85.112 NMAC or the applicable provisions of 40 CFR Part 75, both at the time of the initial certification or recertification application submission and at the time of the audit, the department will issue a notice of disapproval of the certification status of such monitoring system. For the purposes of this subsection, an audit shall be either a field audit or an audit of any information submitted to the department or the administrator. By issuing the notice of disapproval, the department revokes prospectively the certification status of the monitoring system. The data measured and recorded by the monitoring system shall not be considered valid quality assured data from the date of~~

issuance of the notification of the revoked certification status until the date and time that the owner or operator completes subsequently approved initial certification or recertification tests for the monitoring system. The owner or operator shall follow the applicable initial certification or recertification procedures in 20.2.85.112 NMAC for each disapproved monitoring system.  
[20.2.85.113 NMAC – N, 06/15/07]

**20.2.85.114** — **NOTIFICATIONS.** The Hg designated representative of an electric generating unit shall submit written notices to the department and the administrator in accordance with 40 CFR 75.61.  
[20.2.85.114 NMAC – N, 06/15/07]

**20.2.85.115** — **RECORDKEEPING AND REPORTING.**

**A.** The Hg designated representative of an electric generating unit shall comply with all recordkeeping and reporting requirements in this section and the applicable requirements of 40 CFR 75.84.

**B.** Certification applications. The Hg designated representative of an electric generating unit shall submit an application to the department within 45 days after completing all initial certification or recertification tests required under 20.2.85.112 NMAC, including the information required under 40 CFR 75.63.

**C.** Quarterly reports. The Hg designated representative of an electric generating unit shall submit to the administrator quarterly reports, as follows:

**(1)** Report of the mercury mass emissions data and heat input data for the electric generating unit, in an electronic quarterly report in a format prescribed by the administrator, for each calendar quarter beginning with:

**(a)** for an electric generating unit that commences commercial operation before July 1, 2008, the calendar quarter covering January 1, 2009 through March 31, 2009; or

**(b)** for an electric generating unit that commences commercial operation on or after July 1, 2008, the calendar quarter corresponding to the earlier of the date of provisional certification or the applicable deadline for initial certification under Subsection B of 20.2.85.111 NMAC, unless that quarter is the third or fourth quarter of 2008, in which case reporting shall commence in the quarter covering January 1, 2009 through March 31, 2009.

**(2)** The Hg designated representative shall submit each quarterly report to the administrator within 30 days following the end of the calendar quarter covered by the report. Quarterly reports shall be submitted in the manner specified in 40 CFR 75.84(f).

**(3)** For electric generating units that are also subject to an acid rain emissions limitation, quarterly reports shall include the applicable data and information required by 40 CFR 75 Subparts F through H as applicable, in addition to the mercury mass emission data, heat input data, and other information required by this part.

**D.** Compliance certification. The Hg designated representative of an electric generating unit shall submit to the administrator and the department a compliance certification in support of each quarterly report in a format prescribed by the administrator, based on reasonable inquiry of those persons with primary responsibility for ensuring that all of each electric generating unit's emissions are correctly and fully monitored. The certification shall state that:

**(1)** the monitoring data submitted were recorded in accordance with the applicable requirements of this part and 40 CFR Part 75, including the quality assurance procedures and specifications; and

**(2)** for an electric generating unit with add-on mercury emission controls, a flue gas desulfurization system, a selective catalytic reduction system, or a compact hybrid particulate collector system and for all hours where mercury data are substituted in accordance with 40 CFR 75.34(a)(1), the mercury add-on emission controls, flue gas desulfurization system, selective catalytic reduction system, or compact hybrid particulate collector system were operating within the range of parameters listed in the quality assurance/quality control program under 40 CFR 75 Appendix B, or quality-assured sulfur dioxide emission data recorded in accordance with 40 CFR Part 75 document that the flue gas desulfurization system, or quality-assured nitrogen oxides emission data recorded in accordance with 40 CFR Part 75 document that the selective catalytic reduction system, was operating properly, as applicable, and the substitute data values do not systematically underestimate mercury emissions.  
[20.2.85.115 NMAC – N, 06/15/07]

**20.2.85.116** — **PETITIONS.** The Hg designated representative of an electric generating unit may submit a petition under 40 CFR 75.66 to the department and the administrator requesting approval to apply an alternative to any requirement of 20.2.85.111 NMAC through 20.2.85.115 NMAC and 20.2.85.117 NMAC. Application of an alternative to any requirement of 20.2.85.111 NMAC through 20.2.85.115 NMAC and 20.2.85.117 NMAC is in

accordance with this section and ~~20.2.85.111 NMAC through 20.2.85.115 NMAC and 20.2.85.117 NMAC~~ only to the extent that the petition is approved in writing by the administrator, in consultation with the department.  
[~~20.2.85.116 NMAC – N, 06/15/07~~]

~~20.2.85.117 — ADDITIONAL REQUIREMENTS TO PROVIDE HEAT INPUT DATA.~~ The owner or operator of an electric generating unit that monitors and reports mercury mass emissions using a mercury concentration monitoring system and a flow monitoring system shall also monitor and report heat input rate at the electric generating unit level using the procedures set forth in 40 CFR Part 75.  
[~~20.2.85.117 NMAC – N, 06/15/07~~]

**HISTORY OF 20.2.85 NMAC:** [RESERVED]

**History of Repealed Material** [RESERVED]







**STATE OF NEW MEXICO  
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD**

**IN THE MATTER OF PROPOSED REPEAL  
OF 20.2.85 NMAC, MERCURY EMISSION STANDARDS  
AND COMPLIANCE SCHEDULES FOR  
ELECTRIC GENERATING UNITS**

**No. EIB 13-09 (R)**

**WRITTEN DIRECT TESTIMONY OF ROBERT SPILLERS**

**1    Witness Qualifications**

2           Robert Spillers is an Environmental Analyst in the Planning Section, Air Quality Bureau,  
3 of the New Mexico Environment Department. He has worked with the Air Quality Bureau since  
4 September of 2005. Mr. Spillers holds a Bachelor of Science degree in Environmental Science  
5 and Management from New Mexico Highlands University. His resume is attached as NMED  
6 Exhibit 1.

**7    Introduction**

8           Madame Chair and Members of the Board, I am here to present this direct testimony on  
9 behalf the New Mexico Environment Department's (Department) proposed repeal of 20.2.85  
10 New Mexico Administrative Code (NMAC) - *Mercury Emission Standards and Compliance*  
11 *Schedules for Electrical Generating Units*. A copy of the regulation proposed for repeal is  
12 marked as NMED Exhibit 3. During my testimony I will refer to this regulation as Part 85. My  
13 written testimony is marked as NMED Exhibit 4.

**14   Health Impacts of Power Plant Mercury Emissions**

15           Mercury is a naturally occurring element that is found in air, water and soil. Mercury is  
16 found in many rocks including coal. When coal is burned, mercury is released into the  
17 environment. Coal-burning power plants in the United States are responsible for about 50 percent  
18 of mercury emissions (Source: Fact Sheet Mercury and Air Toxics Standards for Power Plants,  
19 available at <http://www.epa.gov/mats/pdfs/20111221MATSummaryfs.pdf>)

20           Once mercury from the air reaches water, microorganisms can change it into  
21 methylmercury, a highly toxic form that builds up in fish. People are primarily exposed to  
22 mercury by eating contaminated fish. The U.S. Environmental Protection Agency (EPA)  
23 Mercury Basic Information, available at <http://www.epa.gov/hg/about.htm>, states that:

24           Mercury exposure at high levels can harm the brain, heart, kidneys, lungs, and  
25 immune system of people of all ages. Research shows that most people's fish  
26 consumption does not cause a health concern. However, it has been demonstrated  
27 that high levels of methylmercury in the bloodstream of unborn babies and young

1 children may harm the developing nervous system, making the child less able to  
2 think and learn.

### 3 **History**

#### 4 **The Federal Clean Air Mercury Rule**

5 The U.S. Environmental Protection Agency (EPA) promulgated the Clean Air Mercury  
6 Rule, or CAMR, in 2005. 70 Fed. Reg. 28606 (May 18, 2005). CAMR required a reduction of  
7 nationwide mercury emissions to within a "cap," implemented in two phases. In the first phase,  
8 beginning in 2010, the cap was 38 tons (76,000 lbs.) nationwide. In the second phase, beginning  
9 in 2018, the cap was to be 15 tons (30,000 lbs.) nationwide.

10 CAMR did not require specific mercury reduction technologies or performance levels for  
11 existing sources in either phase. Instead, it provided an emissions budget for each state based on  
12 existing electric generating units (EGUs), and allowed states to determine how to meet the cap,  
13 though EPA strongly encouraged states to participate in a national emissions trading program.

14 In the first phase, the mercury emissions budgets were designed to reflect the "co-benefit"  
15 reductions realized through the requirements of the federal Clean Air Interstate Rule (CAIR),  
16 promulgated in March 2005. That is, mercury reductions would have been achieved by reducing  
17 sulfur dioxide and nitrogen oxides emissions as required by the CAIR. However, the CAIR  
18 applied only to approximately the eastern half of the U.S. and did not require emissions  
19 reductions in New Mexico. The cap imposed in the second phase would have required reductions  
20 beyond those realized under the CAIR.

#### 21 **CAMR in New Mexico**

22 The Department developed 20.2.85 NMAC - *Mercury Emission Standards and*  
23 *Compliance Schedules for Electrical Generating Units* in response to the CAMR. Part 85  
24 applies to new and existing coal-fired electric utility steam generating units with a capacity of 25  
25 megawatts (MW) or more. There are two existing facilities that meet these criteria:

- 26 • The Public Service Company of New Mexico's San Juan Generating Station (PNM) near  
27 Farmington which has four units with a total nameplate capacity of 1,848 MW.
- 28 • Tri-State Generation and Transmission Association's Escalante Generating Station (Tri-  
29 State) near Grants, which has one unit with a nameplate capacity of 257 MW.

30 Under CAMR the Department had the option to either participate in the recommended  
31 trading program (cap and trade) or develop an approvable method in which the State would meet  
32 the mercury emissions caps as outlined in CAMR. Cap and trade is an environmental policy tool  
33 that delivers results with a mandatory cap on emissions while providing sources flexibility in  
34 how facilities comply. Cap and trade programs use emission allowances as the currency to  
35 comply with emission reduction requirements.

36 The Department opted out of the trading program and developed an EPA-approved  
37 method to meet the mandated emission caps. The Department had concerns about cap and trade  
38 for mercury because it can allow power plants to buy credits from somewhere else and result in

1 areas with high concentrations of emissions, or hot spots. By prohibiting trading, mercury  
2 reductions anticipated under the existing requirements would occur at the mercury sources in  
3 New Mexico, and could not be met by buying allowances from sources located elsewhere.

4 The mercury emissions budgets for New Mexico under the CAMR are:

- 5 • for calendar years 2010 through 2017, 9,568 ounces (598 pounds) per year; and
- 6 • for calendar year 2018 and each calendar year thereafter, 3,776 ounces (236 pounds) per  
7 year.

8 Beginning in calendar year 2010, the state's annual allowable mercury emissions from  
9 electric generating units apply as the following facility-wide mercury emission limitations.

10 For the calendar years 2010 through 2017:

- 11 • San Juan Generating Station shall emit no more than 7808 ounces (488 pounds) of  
12 mercury per calendar year; and
- 13 • Escalante Generating Station shall emit no more than 1280 ounces (80 pounds) of  
14 mercury per calendar year; and
- 15 • new facilities and any other facilities except San Juan and Escalante generating stations,  
16 in aggregate, shall emit no more than 480 ounces (30 pounds) of mercury per calendar  
17 year.

18  
19 For the calendar year 2018 and each calendar year thereafter:

- 20 • San Juan Generating Station shall emit no more than 3328 ounces (208 pounds) of  
21 mercury per calendar year; and
- 22 • Escalante Generating Station shall emit no more than 340 ounces (21.25 pounds) of  
23 mercury per calendar year; and
- 24 • new facilities and any other facilities except San Juan and Escalante generating stations,  
25 in aggregate, shall emit no more than 113 ounces (7.063 pounds) of mercury per calendar  
26 year.

27 A hearing before the Environmental Improvement Board was convened in April of 2007  
28 at which Part 85 was adopted. NMED Exhibit 5, Statement of Reasons in EIB No. 06-15(R).

### 29 **Vacatur of the Clean Air Mercury Rule**

30  
31 On February 8, 2008, the U.S. Court of Appeals for the District of Columbia Circuit, in a  
32 unanimous decision, vacated CAMR. In the decision, the Court found that EPA's action to  
33 remove oil- and coal-fired EGUs from the list of source categories to be regulated under Clean  
34 Air Act (CAA) Section 112 did not comply with the requirements of the statute. This de-listing  
35 decision was a pre-requisite to the promulgation of the CAMR, which was issued under the  
36 authority of CAA Section 111. The court determined that EGUs must be regulated under CAA  
37 Section 112 standards (for hazardous air pollutants, or HAPs), rather than the Section 111  
38 standards (New Source Performance Standards or NSPS). See NMED Exhibit 6, *New Jersey v.*  
39 *EPA*, 517 F.3d 574 (D.C. Cir. 2008).

40  
41 The vacatur was mandated by the Court on March 14, 2008 and the associated mercury

1 rule (CAMR) is no longer effective. On May 20, 2008, the U.S. Court of Appeals for the D.C.  
2 Circuit denied requests by EPA and the Utility Air Regulatory Group for a rehearing on the  
3 court's February 8, 2008 decision to vacate CAMR. This denial means the order to vacate  
4 CAMR remains in effect.  
5

6 With the vacatur of CAMR, EPA was required to develop a maximum achievable control  
7 technology (MACT) standard for coal- and oil-fired EGUs under CAA Section 112.

8 In response to the vacatur of CAMR and the promulgation of the Mercury and Air Toxics  
9 Standards, the Department formally withdrew its SIP submittal for Part 85. See NMED Exhibit  
10 8, Feb. 10, 2012, Letter from Secretary Martin to Regional Administrator Armendariz, at p. 2.

### 11 **Mercury Air Toxics Standards (MATS)**

12 On December 16, 2011, the EPA finalized the Mercury and Air Toxics Standards  
13 (MATS) under CAA § 112. 77 Fed. Reg. 9304 (Feb.16, 2012), see excerpts at NMED Exhibit 7.  
14 EPA made minor modifications to the MATS in April 2013. 78 Fed. Reg. 24073 (Apr. 24,  
15 2013). The MATS rule was promulgated in accordance with a consent decree which settled a  
16 lawsuit brought after CAMR was vacated, alleging that EPA had failed to promulgate final CAA  
17 Section 112 standards for hazardous air pollutants from coal- and oil-fired EGUs. See NMED  
18 Exhibit 7, at p. 9308.

19 The final rule establishes power plant emissions standards for mercury which will result  
20 in a 90 percent reduction of mercury emissions from coal-fired power plants. The MATS provide  
21 regulatory certainty for power plants and requires all existing plants to limit their emissions of  
22 mercury as newer plants already do. Use of widely-available controls will reduce harmful air  
23 toxics and help modernize the aging fleet of power plants, many of which are over 50 years old.

24 The MATS rule sets standards, as outlined in 77 Fed. Reg. 9304, Table-2-Emission  
25 Limits for Existing EGUs, given in mass per Gigawatt hour, for all Hazardous Air Pollutants  
26 (HAPs) emitted by coal- and oil-fired EGUs with a capacity of 25 megawatts or greater. These  
27 are called national emission standards for hazardous air pollutants (NESHAP), also known as  
28 maximum achievable control technology (MACT) standards. Table I, NMED Exhibit 9, shows  
29 the MATS emission limits for the applicable facilities within the jurisdiction of the Department.

30 Emissions standards set under the toxics program are federal air pollution limits that  
31 individual facilities must meet by a set date. MACT for new sources must be at least as stringent  
32 as the emission reductions achieved by the best performing similar source. Existing source  
33 MACT standards must be at least as stringent as the emission reductions achieved by the average  
34 of the top 12 percent best controlled sources.

35 The MATS is codified at 40 CFR Parts 60 and 63, which were adopted by reference in  
36 20.2.77 and 20.2.82 NMAC. The MATS was therefore adopted by the Board when it updated  
37 the incorporation by reference of Parts 60 and 63 in November 2013.  
38

1 **Current Mercury Reductions**

2 On March 5, 2005, PNM entered into a consent decree with the Grand Canyon Trust, the  
3 Sierra Club, and the Department to settle alleged violations of the CAA. As part of the  
4 conditions set forth in the Consent Decree, PNM was required to install and operate mercury  
5 reduction equipment at the San Juan Generating Station. The consent decree can be found at:  
6 [http://nmsierraclub.org/sites/default/files/20055-10SanJuanfinaldecreeeasentered%20\(2\).pdf](http://nmsierraclub.org/sites/default/files/20055-10SanJuanfinaldecreeeasentered%20(2).pdf).

7 Table I in NMED Exhibit 9, compares the potential mercury reduction benefits achieved  
8 through the MATS, the mercury emission caps as outlined in Part 85, and the current mercury  
9 emissions reported using the EPA’s Toxic Release Inventory Program. Figures I and II in NMED  
10 Exhibit 9 show the mercury emission reduction trends for the years 2000 through 2012 for the  
11 San Juan and Escalante generating stations.

12 **Future Mercury Reductions Mechanisms**

13 The following mechanisms are in place that will address future mercury emission  
14 reductions from affected facilities:

- 15 • In January of 2008 the EIB adopted 20.2.86 NMAC - *Best Available Control Technology*  
16 *for Mercury at New Power Plants*. The regulation was authorized by amendments to the  
17 Air Quality Control Act at NMSA 1978, § 74-2-5 (C)(4) made by House Bill (HB) 318 in  
18 the 2007 Legislative Session. Section 20.2.86.101 NMAC provides that: “Prior to and at  
19 all times when generating electric power, each coal-fired power plant shall implement a  
20 control strategy for mercury emissions that removes the greater of what is achievable  
21 with best available control technology or ninety percent removal of the mercury from the  
22 input fuel.” In accordance with NMSA 1978, § 74-2-5 (C)(4), this requirement applies  
23 only to power plants built after July 1, 2007. Part 86, as authorized by HB 318, provides  
24 limits that are potentially more stringent than applicable federal rules, such as the MATS  
25 rule, for mercury emissions from new power plants,  
26
- 27 • On September 5, 2013, the Board adopted a revised determination of the best available  
28 retrofit technology (BART) determination under the regional haze rule for PNM’s San  
29 Juan Generating Station. If approved by the EPA, that BART determination will require  
30 PNM to retire San Juan Units 2 and 3 by the end of 2017. This would result in mercury  
31 emission reductions at the San Juan Generating Station of approximately 50% . See Revised  
32 BART Determination at:  
33 [http://www.nmenv.state.nm.us/aqb/reghaz/documents/AppxD\\_BARTAnalysis\\_SJGS\\_06272](http://www.nmenv.state.nm.us/aqb/reghaz/documents/AppxD_BARTAnalysis_SJGS_06272013.pdf)  
34 [013.pdf](http://www.nmenv.state.nm.us/aqb/reghaz/documents/AppxD_BARTAnalysis_SJGS_06272013.pdf)

35 **Repeal of Part 85**

36 Through a Department initiative, the NMED Improving Environmental Permitting report  
37 was drafted. Air Quality Bureau permitting and planning staff identified several regulations that  
38 may be outdated and should be evaluated for repeal or amendment, including Part 85. Pursuant  
39 to the recommendations of the Improving Environmental Permitting report the Department  
40 evaluated Part 85, and bases its recommendations on the following:

- 1 • the vacatur of CAMR left the Department without federal enforceability of Part 85 which  
2 could be challenged in the courts;  
3 • the SIP submittal to EPA of Part 85 has already been withdrawn due to the vacatur of  
4 CAMR;  
5 • the implementation and delegation to the Department of the MATS rule provides  
6 regulatory certainty for power plants and enables the Department to regulate mercury  
7 emissions for the applicable facilities with federal oversight;  
8 • the existence of both rules, MATS and Part 85, creates confusing and redundant issues  
9 associated with the regulation and enforcement of Part 85 thus creating excess regulatory  
10 burdens on the regulated facilities;  
11 • the potential for disproportionate impacts of mercury emissions in the local communities  
12 from surrounding existing facilities is no longer an issue under the MATS rule because it  
13 does not provide for emissions trading; and  
14 • the repeal of Part 85 will not have any adverse effects when it comes to the regulation of  
15 mercury emissions from coal-fired generating facilities in New Mexico.

16 The Department determined that the repeal of Part 85 would be in the best interest of the  
17 regulated facilities and the environment by providing greater regulatory certainty and will not  
18 adversely affect the environment; therefore, the Department recommends the repeal of Part 85.

#### 19 **Public Notice and Outreach**

20 A public notice of the proposed repeal of Part 85 was published in the New Mexico  
21 Register on December 30, 2013, NMED Exhibit 10-A, and in the Albuquerque Journal, in both  
22 English and Spanish, on January 12, 2014. NMED Exhibit 10-B. The Department provided an  
23 Open House on February 3, 2014 at the NMED Air Quality Bureau, 525 Camino de los  
24 Marquez, Santa Fe, NM 87505, but no members of the public attended.

25 This concludes my testimony, thank you.





STATE OF NEW MEXICO  
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD



IN THE MATTER OF PROPOSED ADOPTION OF  
20.2.85 NMAC-Mercury Emissions Standards and  
Compliance Schedules for Electric Generating Units  
AND PROPOSED AMENDMENTS TO  
20.2.71 NMAC – Operating Permit Emission Fees  
20.2.77 NMAC- New Source Performance Standards  
20.2.84 NMAC- Acid Rain Permits

EIB No. 06-15(R)

NEW MEXICO ENVIRONMENT  
DEPARTMENT,

Petitioner.

**ORDER AND STATEMENT OF REASONS  
FOR AMENDMENT OF REGULATIONS**

THIS MATTER comes before the New Mexico Environmental Improvement Board ("Board") upon a petition filed by the Environmental Protection Division ("Division") of the New Mexico Environment Department ("NMED" or "Petitioner") proposing adoption of Mercury Emission Standards and Compliance Schedules for Electric Generating Units in Title 20, Chapter 2, Part 85 NMAC and proposing revisions to Operating Permit Emissions Fees, New Source Performance Standards, Acid Rain Permits in Title 20, Chapter 2, Parts 71, 77, and 84 NMAC. A public hearing was held in Albuquerque, New Mexico on April 4, 2007, with a quorum of the Board present during the hearing. The Board heard technical testimony from Petitioner and the Center for Energy and Economic Development ("CEED") and admitted exhibits into the record. The Board also heard non-technical testimony and admitted exhibits from Tri-State Generation and Transmission ("Tri-State"). On April 4, 2007, the Board

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NMED Exh. 5

deliberated and voted unanimously to adopt the amendments set forth below in relevant part, for the reasons that follow.

### I. AMENDMENTS

1. The proposed adoption of Mercury Emission Standards and Compliance Schedules for Electric Generating Units in Title 20, Chapter 2, Part 85 NMAC and proposed revisions to Operating Permit Emissions Fees, New Source Performance Standards, Acid Rain Permits in Title 20, Chapter 2, Parts 71, 77, and 84 NMAC were adopted by the Board at its April 4, 2007 meeting. *See* NMED's Exhibit # 1.

### II. STATEMENT OF REASONS

1. NMED filed its Petition for Public Hearing to Consider Proposed Amendments to Title 20, Chapter 2, Part 71, 77, 84 & 85 of the New Mexico Administrative Code ("NMAC") on December 15, 2006.
2. The Board met at its January 2007 meeting and scheduled a hearing for its April 2007 meeting.
3. Notice of Hearing was published in the Albuquerque Journal on February 9, 2007.
4. Notice of Hearing was published in the New Mexico Register on February 6, 2007.
5. NMED filed a Notice of Intent to Present Technical Testimony on March 19, 2007.
6. CEED filed a Notice of Intent to Present Technical Testimony on March 23, 2007.
7. NMED filed a Motion to Exclude Technical Testimony of CEED on March 28, 2007.
8. Hearing Officer Green held a pre-hearing conference on April 3, 2007, and denied NMED's motion on grounds that the NMED/Board website still listed a ten (10) day pre-hearing deadline for NOIs. Therefore, CEED had met the website deadline even though

the Board had recently changed its administrative rule on the time period to a fifteen (15) day period. Hearing Officer Green asked CEED and Tri-State representatives whether they wanted to request a continuance of the hearing because they may not have all their witnesses available on April 4, 2007, but they voluntarily declined this option.

9. A hearing was convened in this matter on April 4, 2007 in Albuquerque, New Mexico.
10. Mr. Jim Norton, Environmental Protection Division Director, provided oral testimony at the hearing in support of the amendments.
11. His testimony established the following: (a) the timeline of NMED's lawsuit (along with several other states) against the United States Environment Protection Agency ("EPA") regarding mercury emission issues; (b) NMED's decision to conduct rule-making on mercury emission issues in order to retain state primacy; (c) twenty-three states have adopted their own mercury emission regulations rather than copy all portions of the EPA template regulation ("Clean Air Mercury Rule" or "CAMR"); (d) NMED's policy objection to a trade program dealt with the risks of creating mercury hot spots; (e) thirteen states have prohibited a trade program in their mercury emissions regulations and (f) the 2007 Legislature passed House Bill 318, which will allow NMED starting in July 2007 to promulgate regulations mercury emission that are more stringent than federal regulations for new power plants. *See* NMED's Exhibits #11,12.
12. His testimony further established that PNM is the largest mercury facility emitter in New Mexico and has entered into a Consent Decree with NMED that includes substantial deductions to mercury emissions.
13. Mr. Andy Berger, Manager of the Control Strategies Section of the Air Quality Bureau, provided oral and written testimony at the hearing in support of the amendments.

14. His testimony established that: (a) EPA promulgated CAMR on May 18, 2005, with small amendments to the rule in June 2006; (b) CAMR requires a reduction of nationwide mercury emissions in two phases in 2010 and 2018; (c) CAMR does not require specific mercury reduction technologies or performance levels for existing sources in either phase; and (d) CAMR provides an emissions budget for each state based on existing emissions and allows states to determine how to meet the cap. *See* NMED's Exhibits #7, 23.
15. NMED wrote EPA on November 14, 2006, that: "As allowed under 40 CFR § 60.24, New Mexico has opted not to participate in national emissions trading in order to meet its emissions budget." *See* NMED's Exhibit #15.
16. Mr. Berger's testimony established the following: (a) Part 85 is new language governing mercury emissions from electric generating units; (b) Part 71 is revised language regarding collecting fees for enforcement; (c) Part 77 is revised language incorporating by reference federal standards; and (d) Part 84 is revised language regarding date changes and definitional changes needed for consistency in the document.
17. (e) Section 109 of Part 85 prohibits a trading program in New Mexico; and (f) Section 112 of Part 71 has a fee provision that is based on what is needed to collect approximately \$85,000 to fund a full-time-employee to administer the mercury program. *See* NMED's Exhibits #7, 23.
18. His testimony established that: (a) mercury is a neurotoxin regulated by the Clean Air Act as a hazardous air pollutant and can be particularly harmful to pregnant women; (b) mercury is generated by combustion of fuels; (c) mercury has been found in fish in New Mexico; (d) total mercury concentrations have been recorded at 17.5 ng/L in Sierra

County, New Mexico by the National Atmospheric Deposition Program; and (e) mercury can bioaccumulate in increasing concentrations up the food chain. *See* NMED's Exhibits #7, 9,10.

19. His testimony established that there are presently only two facilities, PNM's San Juan Generating Station and Tri-State's Escalante Generating Station, in New Mexico that would be subject to Part 85. *See* NMED's Exhibit #7.

20. His testimony established that: (a) NMED tried to accommodate stakeholders with realistic cut downs in emissions; and (b) EPA required a small percentage of the cap set aside for potential new facilities.

21. His testimony established that location of the two facilities are in counties with a high proportion of Native Americans and low income citizens and to cap mercury emissions in these areas would be consistent with environment justice issues.

22. His testimony established that: (a) NMED held a public meeting on October 28, 2005; (b) a second public meeting on June 26, 2006, and this meeting was attended by representatives of PNM, Tri-State, and Xcel Energy; (c) a third public meeting on October 2, 2006, and this meeting was attended by representatives of PNM, Tri-State, and a citizen; (d) NMED received written comment from Tri-State on June 20, 2006, July 14, 2006, October 12, 2006 and CEED on October 27, 2006 *See* NMED's Exhibits #7.

23. His testimony established that NMED published a draft rule for public review and sent a copy to EPA. *See* NMED's Exhibit #3.

24. EPA commented on February 26, 2007: "Although New Mexico is promulgating a non-trading mercury regulation, some revisions to the CAMR model trading rule that are finalized (e.g., concerning the Hg designated representative, alternative Hg designated

representative, and emissions monitoring) in the CAMR Federal Plan rulemaking might eventually need to be reflected in New Mexico's State Plan." *See* NMED's Exhibit #2.

25. The Board has authority to modify a petition because "even substantive changes in the original plan may be made so long as they are in character with the original scheme and a logical outgrowth of the notice and comment already given." BASF Wyandotte Corp., et al. v. Costle, 598 F. 2d 637, 642 (1<sup>st</sup> Cir. 1979), cert. denied, 444 U.S. 1086 (1980).
26. Based on the incorporation of some of EPA's suggested changes from portions of CAMR, NMED amended and submitted its final updated version of the rule to the Board. *See* NMED's Exhibit #1.
27. Pursuant to NMSA 1978, Section 74-1-8(A)(4) (2000) of the Environmental Improvement Act and NMSA 1978, Section 74-2-5(B)(1)-(2) (1992) of the Air Quality Control Act, the Board has the authority to adopt rules regarding air quality management.
28. Pursuant to NMSA 1978, Section 74-2-5(A), (B) and (C), the Board shall prevent or abate air pollution, and shall adopt rules to attain and maintain ambient air quality standards and prevent or abate air pollution.
29. Pursuant to NMSA 1978, Section 74-2-5(E)(1), the Board determines that the amendments would benefit the public in that it would improve air quality and reduce emissions that are harmful to the public. This is applicable to sources located near socio-economically disadvantaged communities. *See* NMED's Exhibits #7, 9, 10.
30. Pursuant to NMSA 1978, Section 74-2-5(E)(1), the Board found the amendments would protect health and human safety and the consequences of the amendments would be improvement in the air quality of the State.

31. Pursuant to NMSA 1978, Section 74-2-5(E)(2), the Board found no evidence that the amendments would cause any environmental injustices or any adverse social or cultural impact.
32. Pursuant to NMSA 1978, Section 74-2-5(E)(2), the Board weighed in its calculation that Tri-State provides power to twelve rural electric cooperatives in New Mexico who serve approximately 150,000 customers. See Tri-State's Exhibit 2.
33. Pursuant to NMSA 1978, Section 74-2-5(E)(2), the Board determined that one goal in amending the regulations was to ensure that source operators know what air pollution control requirements apply to them.
34. Pursuant to NMSA 1978, Section 74-2-5(E)(3), the Board determined that it was economically reasonable to amend the regulations. Tri-State's witness acknowledged that CAMR is a "technology forcing regulation." Tri-State's witness was more concerned with the 2018 cap and the Board concluded that technologies would advance in the next ten years and that the parties could always petition to amend the rule.
35. Pursuant to NMSA 1978, Section 74-2-5(E)(3), Mr. Berger testified that NMED-PNM Consent Decree factored in technical practicability issues and included new possible technologies as part of reducing emissions.
36. While CEED and Tri-State debated whether New Mexico's trading prohibition was the best public policy, the Board found that the industry was well represented in the multi-year rule-making process. There was testimony that PNM had agreed to a consent decree and would comply, and Tri-State could comply, with the amendments.
37. The Board did not accept Tri-State's argument that following the CAMR's trade program lock-step was required under New Mexico's "no more stringent than language" in NMSA

1978, Section 74-2-5(C) based on NMED's testimony that EPA had made the trade program optional for states.

38. The Board debated raising the proposed fee amounts and Tri-State's request to allow existing facilities to petition NMED for the right to use emission cap that has been set aside for new companies, the Board rejected the proposals on grounds there had not been a cost breakdown, these changes had not been vetted through EPA, and it was important to protect the set aside to allow the development of new facilities to come into the state.

39. The Board adopted NMED's proposal without any changes. *See* NMED's Exhibit #1.

40. Pursuant to the Small Business Regulatory Relief Act, NMED noted that the rule would have no impact on small businesses because PNM and Tri-State both employ more than fifty employees. *See* NMED's Exhibit #7.

41. In conclusion, NMED had the authority to bring this petition.

42. The Board has the authority to approve this petition.

43. The petition satisfies all applicable procedural requirements.

44. The proposed replacement regulations satisfy the statutory requirements of NMSA 1978, Sections 74-2-5.

45. The proposed regulations are adopted for any or all of the reasons stated above.

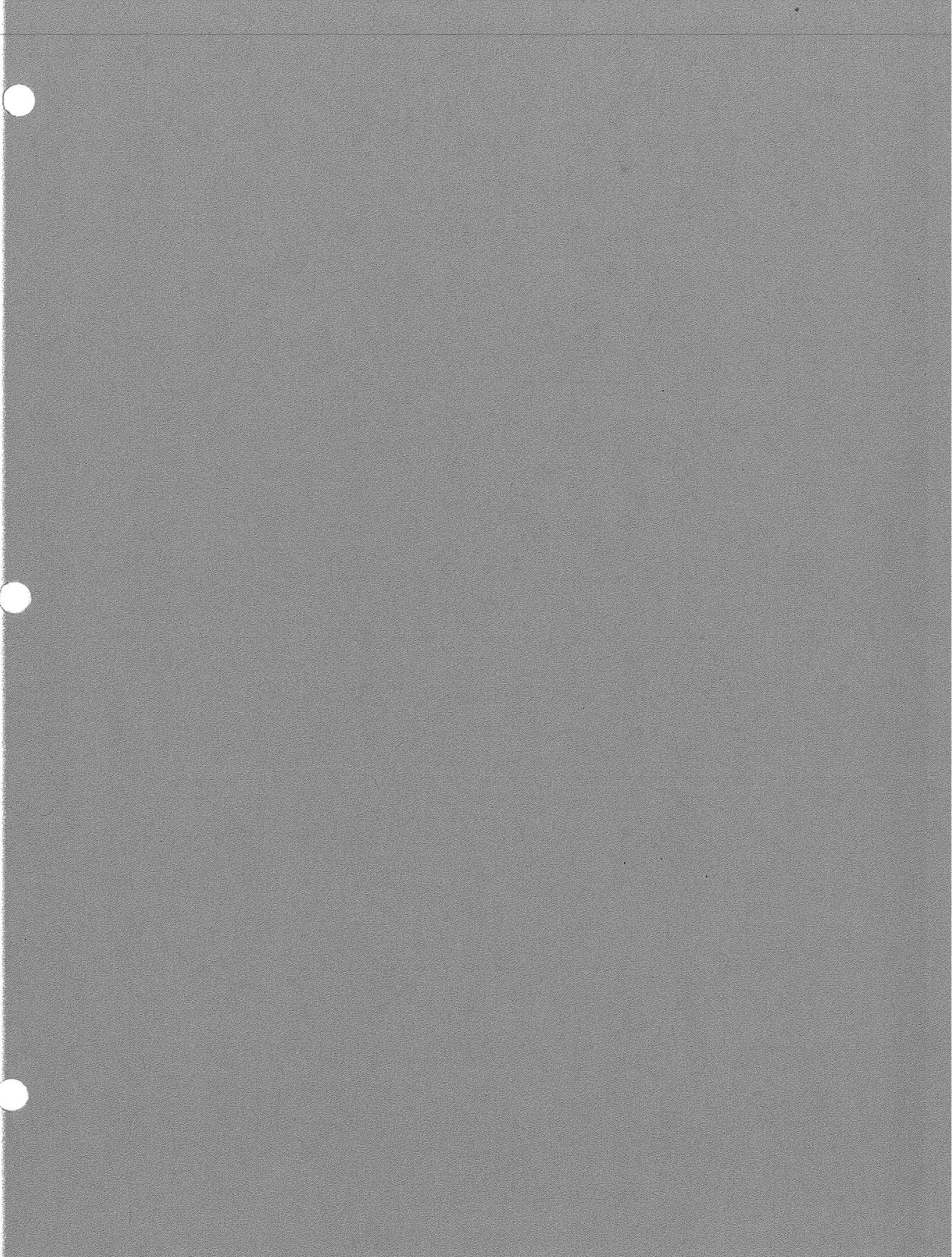
**III. ORDER**

By a unanimous vote, the petition was approved on April 4, 2007. The proposed regulations as set forth in Exhibit #1 with any appropriate corrections of typographical errors, formatting or other changes necessary to file this rule with the New Mexico State Records Center, are hereby adopted, to be effective 30 days after filing with the State Records Center.

  
On behalf of the Board

Dated: 5-1-07







517 F.3d 574  
United States Court of Appeals,  
District of Columbia Circuit.

State of NEW JERSEY, et al., Petitioners  
v.  
ENVIRONMENTAL PROTECTION AGENCY, Respondent  
Utility Air Regulatory Group, et al., Intervenors.

Nos. 05-1097, 05-1104, 05-1116, 05-1118, 05-1158, 05-1159, 05-1160, 05-1162, 05-1163, 05-1164, 05-1167,  
05-1174, 05-1175, 05-1176, 05-1183, 05-1189, 05-1263, 05-1267, 05-1270, 05-1271, 05-1275, 05-1277,  
06-1211, 06-1220, 06-1231, 06-1287, 06-1291, 06-1293, 06-1294. | Argued Dec. 6, 2007. | Decided Feb. 8,  
2008. | Rehearing En Banc Denied May 20, 2008.

**Synopsis**

**Background:** States and others petitioned for review of Environmental Protection Agency (EPA) rules regarding the emission of hazardous air pollutants (HAP) from coal and oil fired electric utility steam generating units.

**[Holding:]** The Court of Appeals, Rogers, Circuit Judge, held that EPA had no authority to delist coal and oil fired utility units without following Clean Air Act (CAA) delisting provisions.

Petitions granted and rule vacated.

\*575 On Petitions for Review of the Final Action of the Environmental Protection Agency.

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Bart E. Cassidy and Meredith DuBarry Huston were on the briefs for petitioner ARIPPA. Carol F. McCabe entered an appearance.

Scott C. Oostdyk, Neal J. Cabral, Grant F. Crandall, Judith Ellen Rivlin, and Eugene M. Trisko were on the briefs for petitioners American Coal for Balanced \*576 Mercury Regulation, et al. and United Mine Workers of America, AFL-CIO.

James B. Vasile, Brian R. Gish, Susan E. Reeves, and Robert K. Reges were on the briefs for petitioner Alaska Industrial Development and Export Authority.

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Henry V. Nickel, F. William Brownell, David G. Scott, and Lee B. Zeugin were on the briefs for petitioner Utility Air Regulatory Group.

Eric G. Hostetler, Attorney, U.S. Department of Justice, argued the cause for respondent. With him on the brief were John C. Cruden, Deputy Assistant Attorney General, Jon M. Lipshultz and Matthew R. Oakes, Attorneys, and Carol S. Holmes and Howard J. Hoffman, Counsel, U.S. Environmental Protection Agency. \*577 Wendy L. Blake, Attorney, U.S. Environmental Protection Agency, entered an appearance.

Lee B. Zeugin argued the cause for Industry State Intervenor and State Amici Curiae. With him on the briefs were Troy King, Attorney General, Attorney General's Office of the State of Alabama, Milt E. Belcher, Assistant Attorney General, Wayne Stenehjem, Attorney General, Attorney General's Office of the State of North Dakota, Paul Seby, Special Assistant, Lyle Witham, Solicitor General, Steve Carter, Attorney General, Attorney General's Office of the State of Indiana, Thomas M. Fisher, Assistant Attorney General, Lawrence E. Long, Attorney General, Attorney General's Office of the State of South Dakota, Roxanne Giedd, Deputy Attorney General, Mark J. Rudolph, Senior Counsel, State of West Virginia, Department of Environmental Protection, Peter H. Wyckoff, Henri D. Bartholomot, Jon C. Bruning, Attorney General, Attorney General's Office of the State of Nebraska, Jodi Fenner, Assistant Attorney General, Patrick Crank, Attorney General, Attorney General's Office of the State of Wyoming, Nancy Vehr, Assistant Attorney General, Henry V. Nickel, F. William Brownell, Lee B. Zeugin, William M. Bumpers, Debra J. Jezouit, and Peter Glaser. Valerie M. Tachtiris, Assistant Attorney General, Attorney General's Office of State of Indiana, Jay A. Jerde and Vicci M. Colgan, Assistant Attorneys General, Attorney General's Office of State of Wyoming, Kevin C. Newsom, Harold P. Quinn, Jr., and Claudia M. O'Brien entered appearances.

Leah W. Casey was on the brief for intervenor for petitioner Adirondack Mountain Club.

Charles H. Knauss, Sandra P. Franco, and David G. Scott, II were on the brief for intervenors Producers for Electric Reliability and West Associates. Karma B. Brown entered an appearance.

John T. Suttles, Jr. was on the brief for intervenors Physicians for Social Responsibility, et al.

Peter Glaser, Daniel J. Popeo, and Paul D. Kamenar were on the brief for amicus curiae Washington Legal Foundation in support of respondent.

Before: ROGERS, TATEL and BROWN, Circuit Judges.

## Opinion

Opinion for the Court by Circuit Judge ROGERS.

ROGERS, Circuit Judge:

**\*\*137** Before the court are petitions for review of two final rules promulgated by the Environmental Protection Agency regarding the emission of hazardous air pollutants (“HAPs”) from electric utility steam generating units (“EGUs”). The first rule removes coal- and oil-fired EGUs from the list of sources whose emissions are regulated under section 112 of the Clean Air Act (“CAA”), 42 U.S.C. § 7412. *Revision of December 2000 Regulatory Finding (“Delisting Rule”)*, 70 Fed.Reg. 15,994 (Mar. 29, 2005). The second rule sets performance standards pursuant to section 111, 42 U.S.C. § 7411, for new coal-fired EGUs and establishes total mercury emissions limits for States and certain tribal areas, along with a voluntary cap-and-trade program for new and existing coal-fired EGUs. *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units (“CAMR”)*, 70 Fed.Reg. 28,606 (May 18, 2005).

Petitioners contend that the Delisting Rule is contrary to the plain text and structure of section 112. In response, EPA and certain intervenors rely on section 112(n), which sets special conditions before EGUs can be regulated under section **\*\*138** **\*578** 112, to justify the rule. We hold that the delisting was unlawful. Section 112 requires EPA to regulate emissions of HAPs. Section 112(n) requires EPA to regulate EGUs under section 112 when it concludes that doing so is “appropriate and necessary.” In December 2000, EPA concluded that it was “appropriate and necessary” to regulate mercury emissions from coal- and oil-fired power plants under section 112 and listed these EGUs as sources of HAPs regulated under that section. In 2005, after reconsidering its previous determination, EPA purported to remove these EGUs from the section 112 list. Thereafter it promulgated CAMR under section 111. EPA’s removal of these EGUs from the section 112 list violates the CAA because section 112(c)(9) requires EPA to make specific findings before removing a source listed under section 112; EPA concedes it never made such findings. Because coal-fired EGUs are listed sources under section 112, regulation of existing coal-fired EGUs’ mercury emissions under section 111 is prohibited, effectively invalidating CAMR’s regulatory approach. Accordingly, the court grants the petitions and vacates both rules.

## I.

In 1970, Congress added section 112 to the CAA. Pub.L. No. 91–604, § 4(a), 84 Stat. 1676, 1685 (1970). In its original form, section 112 required EPA to list HAPs that should be regulated because they could “cause, or contribute to, an increase in mortality or an increase in serious irreversible[ ] or incapacitating reversible[ ] illness.” *Id.* § 112(a)(1). Over the next eighteen years, however, EPA listed only eight HAPs, established standards for only seven of these and as to these seven addressed only a limited selection of possible pollution sources. *See Nat’l Mining Ass’n v. EPA*, 59 F.3d 1351, 1353 n. 1 (D.C.Cir.1995); S. COMM. ON ENV’T & PUB. WORKS, CLEAN AIR ACT AMENDMENTS OF 1989, S.REP. NO. 101–228, at 131 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3516.

In 1990, Congress, concerned about the slow pace of EPA’s regulation of HAPs, altered section 112 by eliminating much of EPA’s discretion in the process. *See, e.g., Nat’l Lime Ass’n v. EPA*, 233 F.3d 625, 633–34 (D.C.Cir.2000). Three aspects of the amendments are relevant here.

First, Congress required EPA to regulate more than one hundred specific HAPs, including mercury and nickel compounds. CAA § 112(b)(1). Further, EPA was required to list and to regulate, on a prioritized schedule, *id.* § 112(e)(1)-(3), “all categories and subcategories of major sources and areas sources” that emit one or more HAPs, *id.* § 112(c)(1). In seeking to ensure that regulation of HAPs reflects the “maximum reduction in emissions which can be achieved by application of [the] best available control technology,” S.REP. NO. 101–228, at 133, *reprinted in* 1990 U.S.C.C.A.N. at 3518; *see, e.g., CAA* § 112(g)(2)(A), Congress imposed specific, strict pollution control requirements on both new and existing sources of HAPs. Congress specified that new sources must adopt at minimum “the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator.” *Id.* § 112(d)(3). Existing sources (with certain exceptions) must adopt emission controls equal to the “average emission limitation achieved by the best performing 12 percent of the existing sources.” *Id.* § 112(d)(3)(A).

Second, Congress restricted the opportunities for EPA and others to intervene in the regulation of HAP sources. For HAPs that result in health effects other than cancer, as is true of mercury, Congress directed that the Administrator “may delete any source category” from the section \*\*139 \*579 112(c)(1) list only after determining that “emissions from no source in the category or subcategory concerned ... exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source.” *Id.* § 112(c)(9). Third parties may not challenge the Administrator’s decision to add a pollutant to the list under section 112(b) or a source category or subcategory to the list under section 112(c) until “the Administrator issues emission standards for such pollutant or category.” *Id.* § 112(e)(4).

Third, Congress required the Administrator to evaluate regulatory options with care and to meet certain conditions before listing EGUs as an HAP source under section 112(c)(1). Specifically:

[t]he Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [EGUs] of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator’s report to Congress alternative control strategies for emissions which may warrant regulation under this section. *The Administrator shall regulate [EGUs] under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.*

*Id.* § 112(n)(1)(A) (emphasis added).

The study of public health hazards required by section 112(n)(1)(A) was finally completed in 1998. This study found “a plausible link between anthropogenic releases of mercury from industrial and combustion sources in the United States and methylmercury in fish” and that “mercury emissions from [EGUs] may add to the existing environmental burden.” EPA, OFFICE OF AIR QUALITY PLANNING AND STANDARDS, STUDY OF HAZARDOUS AIR POLLUTANT EMISSIONS FROM ELEC. UTIL. STEAM GENERATING UNITS—FINAL REPORT TO CONG. 7–1, 45 (1998). On December 20, 2000, the Administrator announced—in light of the study mandated by section 112(n)(1)(A), as well as subsequent information and consideration of alternative feasible control strategies—that it was “appropriate and necessary” to regulate coal- and oil-fired EGUs under section 112 because, as relevant, mercury emissions from EGUs, which are the largest domestic source of mercury emissions, present significant hazards to public health and the environment. *Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units*, 65 Fed.Reg. 79,825, 79,827 (Dec. 20, 2000) (“2000 Determination”). “As a result the source category for Coal- and Oil-Fired [EGUs] was added to the list of source categories under section 112(c)” on December 20, 2000. *National Emission Standards for Hazardous Air Pollutants: Revision of Source Category List Under Section 112 of the Clean Air Act* (“2002 Notice of Listing”), 67 Fed.Reg. 6521, 6522, 6524 (Feb. 12, 2002).

In early 2004, EPA proposed two regulatory alternatives to control emissions from coal- and oil-fired EGUs. The first was similar to EPA’s proposal in 2000—regulation under section 112 through issuance of Maximum Achievable Control Technology standards, *see, e.g.*, CAA § 112(g)(2)(A), or implementation of a cap-and-trade system. The second proposed removing EGUs from the list of HAP sources prepared pursuant to section 112(c)(1) and instead regulating their emissions \*\*140 \*580 under section 111. *Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units*, 69 Fed.Reg. 4652, 4659–61, 4683, 4689 (Jan. 30, 2004). After receiving public comment, EPA chose the second alternative, announcing in March 2005 that it was removing EGUs from the section 112(c)(1) list, Delisting Rule, 70 Fed.Reg. at 16,002–08, 16,032, and regulating mercury emissions from coal-fired EGUs under section 111, CAMR, 70 Fed.Reg. at 28,610, 28,624–32.

EPA justified its decision to delist EGUs by explaining that it “reasonably interprets section 112(n)(1)(A) as providing [ ] authority to remove coal- and oil-fired units from the section 112(c) list at any time that it makes a negative appropriate and necessary finding under the section.” Delisting Rule, 70 Fed.Reg. at 16,032. It based this interpretation on the “entirely different structure and predicate for assessing whether [EGUs] should be listed for regulation under section 112” as set forth

in section 112(n)(1)(A), *id.*, and on the absence of a temporal “deadline” for deciding “whether regulation of [EGUs was] appropriate and necessary” under section 112, *id.* at 16,001. It also interpreted “section 112(c)(9) [delisting] criteria ... not [to] apply” to EGUs because their inclusion in the list established by section 112(c)(1) was not a “final agency action[ ],” and claimed, contrary to the 2000 Determination, that “the source category at issue did not meet the statutory criteria for listing at the time of listing.” *Id.* at 16,033.

Having decided that it possessed the authority to delist EGUs without making the findings required by section 112(c)(9), EPA explained that the delisting of EGUs was justified because their regulation under section 112 was neither “appropriate” nor “necessary.” The potential mercury emissions reductions achievable under CAMR figured prominently in EPA’s explanation of its delisting of coal-fired EGUs, *id.* at 16,005, which EPA promulgated in May 2005. CAMR established plant-specific “standards of performance” for mercury emissions from new coal-fired EGUs under section 111(b). 70 Fed.Reg. at 28,613–16. Relying on sections 111(b) and (d), it also established a national mercury emissions cap for new and existing EGUs, allocating each state and certain tribal areas a mercury emissions budget. This was supplemented by a voluntary cap-and-trade program. *Id.* at 28,616, 28,622, 28,629.<sup>2</sup>

**\*581 \*\*141 II.**

New Jersey and fourteen additional States, the Michigan Department of Environmental Quality, the Pennsylvania Department of Environmental Protection, the City of Baltimore (“Government Petitioners”), and various environmental organizations (“Environmental Petitioners”) contend that EPA violated Section 112’s plain text and structure when it did not comply with the requirements of section 112(c)(9) in delisting EGUs. Because we agree, we do not reach their alternative contention that even if this delisting was lawful, EPA was arbitrary and capricious in reversing its determination that regulating EGUs under section 112 was “appropriate and necessary.” Government and Environmental Petitioners further contend that CAMR is inconsistent with provisions of section 111, and that both the Delisting Rule and CAMR should be vacated. Certain intervenors—including various industry representatives, States, and state agencies—join EPA in urging the lawfulness of the two rules.

The court reviews the challenges to the final rules to determine whether EPA’s promulgation of them was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. *See* CAA § 307(d)(9)(A), 42 U.S.C. § 7607(d)(9)(A). Challenges to EPA’s interpretation of the CAA itself are governed by the familiar two-pronged test of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under step one, the court asks “whether Congress has directly spoken to the ... issue.” *Id.* at 842, 104 S.Ct. 2778. If Congress’s intent “is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43, 104 S.Ct. 2778. However, if the court determines that “Congress has not directly addressed the precise question at issue,” then, under step two, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843, 104 S.Ct. 2778. The agency’s interpretation need not be the only permissible reading of the statute, nor the interpretation that the court might have originally given the statute. *Id.* at 843 n. 11, 104 S.Ct. 2778.

<sup>[1]</sup> Petitioners contend that once the Administrator determined in 2000 that EGUs should be regulated under Section 112 and listed them under section 112(c)(1), EPA had no authority to delist them without taking the steps required under section 112(c)(9). We agree.<sup>3</sup>

Section 112(c)(9) provides that:

The Administrator may delete *any* source category from the [section 112(c)(1) list] ... whenever the Administrator ... [determines] that emissions from no source in the category or subcategory concerned ... exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source. [emphasis added]

**\*582 \*\*142** EPA concedes that it listed EGUs under section 112. Thus, because section 112(c)(9) governs the removal of “*any* source category” (emphasis added) from the section 112(c)(1) list, and nothing in the CAA exempts EGUs from section

112(c)(9), the only way EPA could remove EGUs from the section 112(c)(1) list was by satisfying section 112(c)(9)'s requirements. Yet EPA concedes that it never made the findings section 112(c)(9) would require in order to delist EGUs. EPA's purported removal of EGUs from the section 112(c)(1) list therefore violated the CAA's plain text and must be rejected under step one of *Chevron*.

<sup>12]</sup> EPA offers several arguments in an attempt to evade section 112(c)(9)'s plain text, but they are not persuasive. First, EPA seeks to reach step two of *Chevron* and obtain judicial deference to its interpretation by maintaining that section 112(n)(1) makes section 112(c)(9) ambiguous because "[l]ogically, if EPA makes a determination under section 112(n)(1)(A) that power plants should not be regulated at all under section 112 ... [then] this determination *ipso facto* must result in removal of power plants from the section 112(c) list." Resp't Br. at 26. But this simply does not follow. Section 112(n)(1) governs how the Administrator decides whether to list EGUs; it says nothing about delisting EGUs, and the plain text of section 112(c)(9) specifies that it applies to the delisting of "any source." In the context of the CAA, "the word 'any' has an expansive meaning." *New York v. EPA*, 443 F.3d 880, 885 (D.C.Cir.2006) (citations omitted); *see also id.* at 885–86. Moreover, where Congress wished to exempt EGUs from specific requirements of section 112, it said so explicitly. For example, section 112(c)(6) expressly exempts EGUs from the strict deadlines imposed on other sources of certain pollutants. Furthermore, EPA concedes that listing EGUs under section 112(c) triggered application of some subparts of section 112, *see, e.g.*, 2002 Notice of Listing, 67 Fed.Reg. at 6521, 6524, 6535 n.b; CAA § 112(c)(2), but provides no persuasive rationale for why the comprehensive delisting process of section 112(c)(9) does not also apply. Its brief states only that previous applications of section 112 provisions in response to EGUs' listing were undertaken "based on the fact that [EPA] had made a positive 'appropriate and necessary' finding that was still in place. EPA has now reversed that finding." Resp't Br. at 28. This explanation deploys the logic of the Queen of Hearts, substituting EPA's desires for the plain text of section 112(c)(9). Thus, EPA can point to no persuasive evidence suggesting that section 112(c)(9)'s plain text is ambiguous. It is therefore bound by section 112(c)(9) because "for [ ] EPA to avoid a literal interpretation at *Chevron* step one, it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it," *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C.Cir.1996), showing EPA has failed to make.

<sup>13]</sup> <sup>14]</sup> Second, EPA maintains that it possesses authority to remove EGUs from the section 112 list under the "fundamental principle of administrative law that an agency has inherent authority to reverse an earlier administrative determination or ruling where an agency has a principled basis for doing so." Resp't Br. at 22 (citing *Williams Gas Processing–Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C.Cir.2006); *Dun & Bradstreet Corp. Found. v. USPS*, 946 F.2d 189, 193 (2d Cir.1991)). An agency can normally change its position and reverse a decision, and prior to EPA's listing of EGUs under section 112(c)(1), nothing in the CAA would have **\*\*143 \*583** prevented it from reversing its determination about whether it was "appropriate and necessary" to do so. Congress, however, undoubtedly can limit an agency's discretion to reverse itself, and in section 112(c)(9) Congress did just that, unambiguously limiting EPA's discretion to remove sources, including EGUs, from the section 112(c)(1) list once they have been added to it. This precludes EPA's inherent authority claim for "EPA may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). As this court has observed, "when Congress has provided a mechanism capable of rectifying mistaken actions ... it is not reasonable to infer authority to reconsider agency action." *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C.Cir.1984). Indeed, EPA's position would nullify section 112(c)(9) altogether, not just with regard to EGUs, for EPA is unable to explain how, if it were allowed to remove EGUs from the section 112 list without regard to section 112(c)(9), it would not also have the authority to remove any other source by ignoring the statutory delisting process.

<sup>15]</sup> Finally, EPA states in its brief that it has previously removed sources listed under section 112(c) without satisfying the requirements of section 112(c)(9). But previous statutory violations cannot excuse the one now before the court. "[W]e do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation." *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 598 (D.C.Cir.1996). EPA suggests that it would be "anomalous" for it to be forced to await a court order to correct "its own mistake" in listing coal- and oil-fired EGUs as a source under section 112(c)(1). Resp't Br. at 32; *see also id.* at 33 (citing *Cleveland Nat'l Air Show, Inc. v. DOT*, 430 F.3d 757, 765 (6th Cir.2005)). However Congress was not preoccupied with what EPA considers "anomalous," but rather with the fact that EPA had failed for decades to regulate HAPs sufficiently. *See, e.g., Nat'l Lime Ass'n*, 233 F.3d at 634 (citing S.REP. NO. 101–228, at 128, *reprinted in* 1990 U.S.C.C.A.N. at 3513). In the context of this congressional concern, EPA's disbelief that it would be prevented from correcting its own listing "errors" except through section 112(c)(9)'s delisting process or

court-sanctioned vacatur cannot overcome the plain text enacted by Congress.

<sup>61</sup> Accordingly, in view of the plain text and structure of section 112, we grant the petitions and vacate the Delisting Rule. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C.Cir.1993). This requires vacation of CAMR's regulations for both new and existing EGUs. EPA promulgated the CAMR regulations for existing EGUs under section 111(d), but under EPA's own interpretation of the section, it cannot be used to regulate sources listed under section 112; EPA thus concedes that if EGUs remain listed under section 112, as we hold, then the CAMR regulations for existing sources must fall. Resp't Br. at 99, 101–02; *see also* Delisting Rule, 70 Fed.Reg. at 16,031. EPA promulgated the CAMR regulations for new sources under section 111(b) on the basis that there would be no section 112 regulation of EGU emissions and that the new source performance standards would be accompanied by a national emissions cap and a voluntary cap-and-trade program. *See* CAMR, 70 Fed.Reg. at 28,608–10, 28,614–15, 28,619, 28,622; *see also id.* at 28,616. Given that these vital assumptions were incorrect, the court must vacate CAMR's new source performance standards and remand \*\*144 \*584 them to EPA for reconsideration, for "[s]everance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own." *Davis County Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C.Cir.1997) (citations omitted). In view of our disposition, the court does not reach other contentions of petitioners or intervenors.

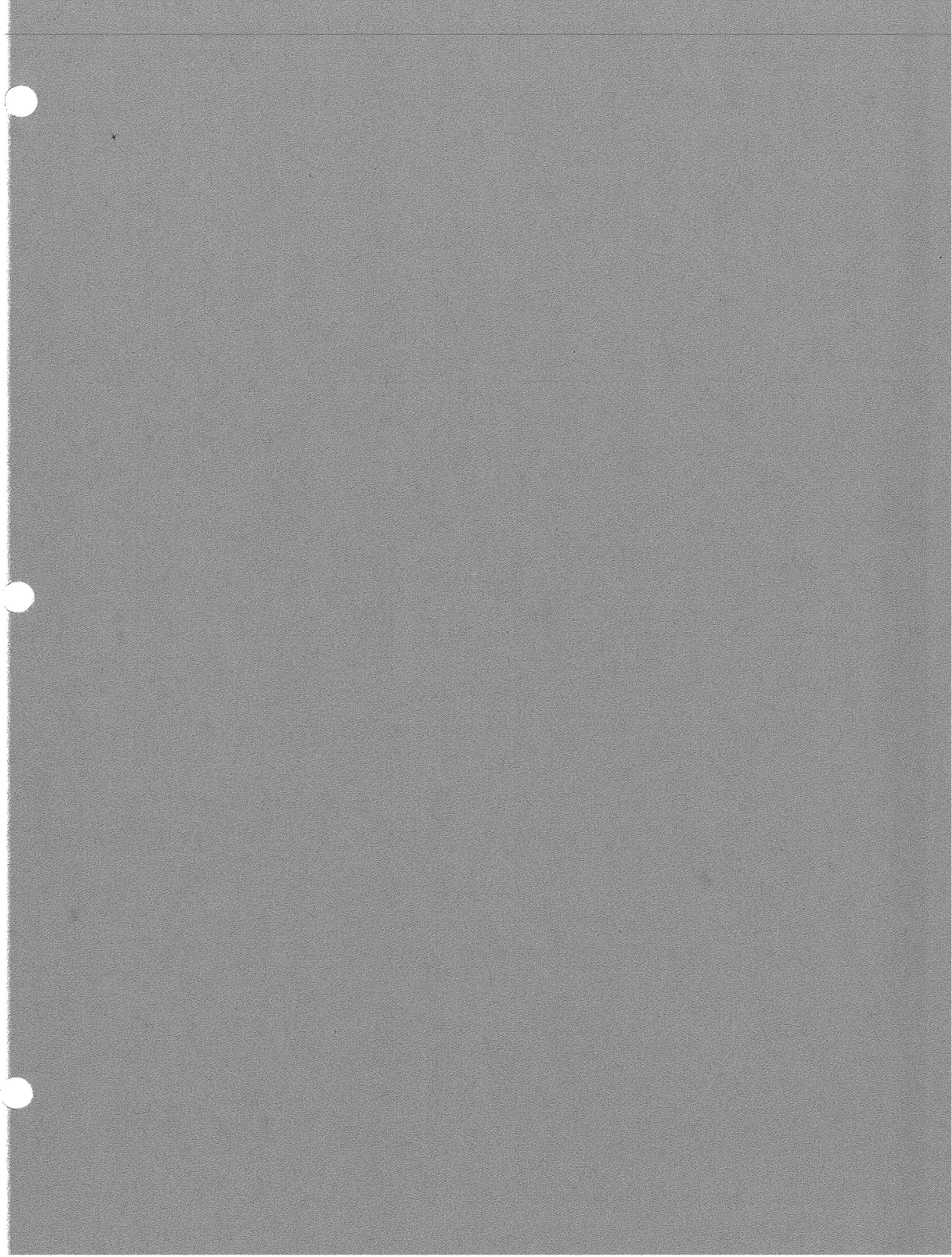
#### Parallel Citations

65 ERC 1993, 380 U.S.App.D.C. 134

#### Footnotes

- <sup>1</sup> Section 111 requires the Administrator to "establish [ ] ... standards of performance," CAA § 111(b)(1)(B), for pollutants from new sources that in the Administrator's judgment "cause[ ] , or contribute [ ] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 111(b)(1)(A). "Standards of performance" are designed to limit emissions to reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." *Id.* § 111(a)(1). Existing sources of pollutants are regulated under section 111(d).
- <sup>2</sup> Upon reconsideration, EPA made no substantive change to the Delisting Rule but revised CAMR's State mercury allocations and the statistical analysis used for new source performance standards; EPA declined to stay CAMR. *Revision of December 2000 Clean Air Act Section 112(n) Finding Regarding Electric Utility Steam Generating Units; and Standards of Performance for New and Existing Electric Utility Steam Generating Units: Reconsideration*, 71 Fed.Reg. 33,388, 33,388–89, 33,395–96 (June 9, 2006).
- <sup>3</sup> Certain intervenors also contend, citing *Thomas v. New York*, 802 F.2d 1443, 1446–47 (D.C.Cir.1986), that the Administrator's determination in December 2000 to list EGUs as a source under section 112(c)(1) was not binding for lack of notice and comment and, consequently, that EPA was never required to comply with section 112(c)(9)'s delisting process for EGUs. We need not consider this contention, however, because EPA has steadfastly refused to join it. *See New York v. Reilly*, 969 F.2d 1147, 1154 n. 11 (D.C.Cir.1992); *see also Util. Air Regulatory Group v. EPA*, No. 01–1074, 2001 WL 936363, at \*1 (D.C.Cir. July 26, 2001).







**ENVIRONMENTAL PROTECTION  
AGENCY**
**40 CFR Parts 60 and 63**

[EPA-HQ-OAR-2009-0234; EPA-HQ-OAR-2011-0044, FRL-9611-4]

RIN 2060-AP52; RIN 2060-AR31

**National Emission Standards for  
Hazardous Air Pollutants From Coal-  
and Oil-Fired Electric Utility Steam  
Generating Units and Standards of  
Performance for Fossil-Fuel-Fired  
Electric Utility, Industrial-Commercial-  
Institutional, and Small Industrial-  
Commercial-Institutional Steam  
Generating Units**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** On May 3, 2011, under authority of Clean Air Act (CAA) sections 111 and 112, the EPA proposed both national emission standards for hazardous air pollutants (NESHAP) from coal- and oil-fired electric utility steam generating units (EGUs) and standards of performance for fossil-fuel-fired electric utility, industrial-commercial-institutional, and small industrial-commercial-institutional steam generating units (76 FR 24976). After consideration of public comments, the EPA is finalizing these rules in this action.

Pursuant to CAA section 111, the EPA is revising standards of performance in response to a voluntary remand of a final rule. Specifically, we are amending new source performance standards (NSPS) after analysis of the public comments we received. We are also finalizing several minor amendments, technical clarifications, and corrections to existing NSPS provisions for fossil fuel-fired EGUs and large and small industrial-commercial-institutional steam generating units.

Pursuant to CAA section 112, the EPA is establishing NESHAP that will require coal- and oil-fired EGUs to meet hazardous air pollutant (HAP) standards reflecting the application of the maximum achievable control technology. This rule protects air quality and promotes public health by reducing emissions of the HAP listed in CAA section 112(b)(1).

**DATES:** This final rule is effective on April 16, 2012. The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of April 16, 2012.

**ADDRESSES:** The EPA established two dockets for this action: Docket ID. No.

EPA-HQ-OAR-2011-0044 (NSPS action) or Docket ID No. EPA-HQ-OAR-2009-0234 (NESHAP action). All documents in the dockets are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information 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 either electronically through <http://www.regulations.gov> or in hard copy at EPA's Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1741.

**FOR FURTHER INFORMATION CONTACT:** For the NESHAP action: Mr. William Maxwell, Energy Strategies Group, Sector Policies and Programs Division, (D243-01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; Telephone number: (919) 541-5430; Fax number (919) 541-5450; Email address: [maxwell.bill@epa.gov](mailto:maxwell.bill@epa.gov). For the NSPS action: Mr. Christian Fellner, Energy Strategies Group, Sector Policies and Programs Division, (D243-01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; Telephone number: (919) 541-4003; Fax number (919) 541-5450; Email address: [fellner.christian@epa.gov](mailto:fellner.christian@epa.gov).

**SUPPLEMENTARY INFORMATION:**

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- F. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments
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**I. General Information**

*A. Does this action apply to me?*

The regulated categories and entities potentially affected by the final standards are shown in Table 1 of this preamble.

**TABLE 1—POTENTIALLY AFFECTED REGULATED CATEGORIES AND ENTITIES**

| Category                            | NAICS code <sup>1</sup> | Examples of potentially regulated entities  |
|-------------------------------------|-------------------------|---|
| Industry .....                      | 221112                  | Fossil fuel-fired electric utility steam generating units.  |
| Federal government .....            | <sup>2</sup> 221122     | Fossil fuel-fired electric utility steam generating units owned by the federal government.            |
| State/local/tribal government ..... | <sup>2</sup> 221122     | Fossil fuel-fired electric utility steam generating units owned by states, tribes, or municipalities. |
|                                     | 921150                  | Fossil fuel-fired electric utility steam generating units in Indian country.                          |

<sup>1</sup> North American Industry Classification System.

<sup>2</sup> Federal, state, or local government-owned and operated establishments are classified according to the activity in which they are engaged.

This table is not intended to be exhaustive, but rather is meant to provide a guide for readers regarding entities likely to be affected by this action. To determine whether you, as owner or operator of a facility, company, business, organization, etc., will be regulated by this action, you should examine the applicability criteria in 40 CFR 60.40, 60.40Da, or 60.40c or in 40 CFR 63.9981. If you have any questions regarding the applicability of this action to a particular entity, consult either the air permitting authority for the entity or your EPA regional representative as listed in 40 CFR 60.4 or 40 CFR 63.13 (General Provisions).

*B. Where can I get a copy of this document?*

In addition to being available in the dockets, an electronic copy of this action will also be available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature by the Administrator, a copy of the action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: <http://www.epa.gov/ttn/oarpg/>. The TTN provides information and technology exchange in various areas of air pollution control.

*C. Judicial Review*

Under CAA section 307(b)(1), judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by April 16, 2012. Under CAA section 307(d)(7)(B), only an objection to this final rule that was raised with reasonable specificity during the period for public comment (including any public hearing) can be raised during judicial review. This section also provides a mechanism for the EPA to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule[.]" Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave. NW., Washington, DC 20004, with a copy to the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of

General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20004. Note, under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

*D. What are the costs and benefits of this final rule?*

Consistent with Executive Order (EO) 13563, "Improving Regulation and Regulatory Review," we have estimated the costs and benefits of the final rule. This rule will reduce emissions of HAP, including mercury (Hg), from the electric power industry. Installing the technology necessary to reduce emissions directly regulated by this rule will also reduce the emissions of directly emitted PM<sub>2.5</sub> and sulfur dioxide (SO<sub>2</sub>), a PM<sub>2.5</sub> precursor. The benefits associated with these PM and SO<sub>2</sub> reductions are referred to as co-benefits, as these reductions are not the primary objective of this rule.

The EPA estimates that this final rule will yield annual monetized benefits (in 2007\$) of between \$37 to \$90 billion using a 3 percent discount rate and \$33 to \$81 billion using a 7 percent discount rate. The great majority of the estimates are attributable to co-benefits from reductions in PM<sub>2.5</sub>-related mortality. The annual social costs, approximated

by the sum of the compliance costs and monitoring and reporting costs, are \$9.6 billion (2007\$) and the annual quantified net benefits (the difference between benefits and costs) are \$27 to \$80 billion using a 3 percent discount rate or \$24 to \$71 billion using a 7 percent discount rate. It is important to note that the PM<sub>2.5</sub> co-benefits reported here contain uncertainty, due in part to the important assumption that all fine particles are equally potent in causing premature mortality and because many

of the benefits are associated with reducing PM<sub>2.5</sub> levels at the low end of the concentration distributions examined in the epidemiology studies from which the PM<sub>2.5</sub>-mortality relationships used in this analysis are derived.

The benefits of this rule outweigh costs by between 3 to 1 or 9 to 1 depending on the benefit estimate and discount rate used. The co-benefits are substantially attributable to the 4,200 to 11,000 fewer PM<sub>2.5</sub>-related premature

mortalities estimated to occur as a result of this rule. The EPA could not monetize some costs and important benefits, such as some Hg benefits and those for the HAP reduced by this final rule other than Hg. Upon considering these limitations and uncertainties, it remains clear that the benefits of this rule, referred to in short as the Mercury and Air Toxics Standards (MATS), are substantial and far outweigh the costs.

TABLE 2—SUMMARY OF THE MONETIZED BENEFITS, SOCIAL COSTS, AND NET BENEFITS FOR THE FINAL RULE IN 2016 [Billions of 2007\$]<sup>a</sup>

|   | 3% Discount rate  | 7% Discount rate     |
|---|---|----------------------|
| Total Monetized Benefits <sup>b</sup> .....               | \$37 to \$90 .....  | \$33 to \$81.        |
| Partial Hg-related Benefits <sup>c</sup> .....            | \$0.004 to \$0.006 .....  | \$0.0005 to \$0.001. |
| PM <sub>2.5</sub> -related Co-benefits <sup>b</sup> ..... | \$36 to \$89 .....  | \$33 to \$80.        |
| Climate-related Co-Benefits <sup>d</sup> .....            | \$0.36 .....  | \$0.36.              |
| Total Social Costs <sup>e</sup> .....                     | \$9.6 .....   | \$9.6.               |
| Net Benefits .....  | \$27 to \$80 .....  | \$24 to \$71.        |
| Non-monetized Benefits .....                              | Visibility in Class I areas.<br>Other neurological effects of Hg exposure.<br>Other health effects of Hg exposure.<br>Health effects of ozone and direct exposure to SO <sub>2</sub> and NO <sub>2</sub> .<br>Ecosystem effects.<br>Health effects from commercial and non-freshwater fish consumption.<br>Health risks from exposure to non-mercury HAP. |                      |

<sup>a</sup> All estimates are for 2016, and are rounded to two significant figures.  
<sup>b</sup> The total monetized benefits reflect the human health benefits associated with reducing exposure to PM<sub>2.5</sub>. The reduction in premature fatalities each year accounts for over 90 percent of total monetized benefits. Benefits in this table are nationwide and are associated with directly emitted PM<sub>2.5</sub> and SO<sub>2</sub> reductions. The estimate of social benefits also includes CO<sub>2</sub>-related benefits calculated using the social cost of carbon, discussed further in chapter 5 of the RIA. Mercury benefits were calculated using the baseline from proposal. The difference in emissions reductions between proposal and final does not substantially affect the Hg benefits.  
<sup>c</sup> Based on an analysis of health effects due to recreational freshwater fish consumption.  
<sup>d</sup> This table shows monetized CO<sub>2</sub> co-benefits that were calculated using the global average social cost of carbon estimate at a 3 percent discount rate. In section 5.6 of the Regulatory Impact Analysis (RIA) we also report the monetized CO<sub>2</sub> co-benefits using discount rates of 5 percent, 2.5 percent, and 3 percent (95th percentile).  
<sup>e</sup> Total social costs are approximated by the compliance costs for both coal- and oil-fired units. This includes monitoring, recordkeeping, and reporting costs.

For more information on how EPA is addressing EO 13563, see the EO discussion in the Statutory and Executive Order Reviews section of this preamble.

**II. Background Information on the NESHAP**

On May 3, 2011, the EPA proposed this rule to address emissions of toxic air pollutants from coal and oil-fired electric generating units as required by the CAA. The proposal explained at length the statutory history and requirements leading to this rule, the factual and legal basis for the rule and its specific provisions, and the costs and benefits to the public health and environment from the proposed requirements.

The EPA received over 900,000 comments from members of the public on the proposed rule, substantially more than for any other prior regulatory

proposal. The comments express concerns about the presence of Hg in the environment and the effect it has on human health, concerns about the costs of the rule, how challenging it may be for some sources to comply and questions about the impact it may have on this country's electricity supply and economy. Many comments provided additional information and data that have enriched the factual record and enabled EPA to finalize a rule that fulfills the mandate of the CAA while providing flexibility and compliance options to affected sources—options that make the rule less costly and compliance more readily manageable.

This rule establishes uniform emissions-control standards that sources can meet with proven and available technologies and operational processes in a timeframe that is achievable. They will put this industry, now the single largest source of Hg emissions in the

United States (U.S.) with emissions of 29 tons per year, on a path to reducing those emissions by approximately 90 percent. Emissions of other toxic metals, such as arsenic (As) and nickel (Ni), dioxins and furans, acid gases (including hydrochloric acid (HCl) and SO<sub>2</sub>) will also decrease dramatically with the installation of pollution controls. And the flexibilities established in this rule along with other available tools provide a clear pathway to compliance without jeopardizing the country's energy supply.

This preamble explains EPA's appropriate and necessary finding, the elements of the final rule, key changes the EPA is making in response to comments submitted on the proposed rule, and our responses to many of the comments we received. A full response to comments is provided in the response to comments document available in the docket for this rulemaking.

*A. What is the statutory authority for this final rule?*

Congress established a specific structure for determining whether to regulate EGUs under CAA section 112.<sup>1</sup> Specifically, Congress enacted CAA section 112(n)(1).

Section 112(n)(1)(A) of the CAA requires the EPA to conduct a study to evaluate the remaining public health hazards that are reasonably anticipated to occur as a result of EGUs' HAP emissions after imposition of CAA requirements. The EPA must report the results of that study to Congress, and regulate EGUs "if the Administrator finds such regulation is appropriate and necessary," after considering the results of that study. Thus, CAA section 112(n)(1)(A) governs how the Administrator decides whether to list EGUs for regulation under CAA section 112. See *New Jersey v. EPA*, 517 F.3d 574 at 582 (D.C. Cir. 2008) ("Section 112(n)(1) governs how the Administrator decides whether to list EGUs; it says nothing about delisting EGUs.").

As directed, the EPA conducted the study to evaluate the remaining public health hazards and reported the results to Congress (Utility Study Report to Congress (Utility Study)).<sup>2</sup> We discuss this study below in conjunction with other studies that CAA section 112(n)(1) requires concerning EGUs. See also 76 FR 24982–24984 (summarizing studies).

Once the EPA lists a source category pursuant to CAA section 112(c), the EPA must then establish technology-based emission standards under CAA section 112(d). For major sources, the EPA must establish emission standards that "require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section" that the EPA determines are achievable taking into account certain statutory factors. See CAA section 112(d)(2). These standards are referred to as "maximum achievable control technology" or "MACT" standards. The MACT standards for existing sources must be at least as stringent as the average emission limitation achieved by the best performing 12 percent of existing sources in the category (for which the Administrator has emissions information) or the best performing 5 sources for source categories with less

than 30 sources. See CAA section 112(d)(3)(A) and (B), respectively. This level of minimum stringency is referred to as the "MACT floor," and the EPA cannot consider cost in setting the floor. For new sources, MACT standards must be at least as stringent as the control level achieved in practice by the best controlled similar source. See CAA section 112(d)(3).

The EPA also must consider more stringent "beyond-the-floor" control options. When considering beyond-the-floor options, the EPA must consider the maximum degree of reduction in HAP emissions and take into account costs, energy, and non-air quality health and environmental impacts when doing so. See *Cement Kiln Recycling Coal v. EPA*, 255 F.3d 855, 857–58 (D.C. Cir. 2001).

Alternatively, the EPA may set a health-based standard for HAP that have an established health threshold, and the standard must provide "an ample margin of safety." See CAA section 112(d)(4). As these standards could be less stringent than MACT standards, the Agency must have detailed information on HAP emissions from the subject sources and sources located near the subject sources before exercising its discretion to set such standards.

For area sources, the EPA may issue standards or requirements that provide for the use of generally available control technologies or management practices (GACT standards) in lieu of promulgating MACT or health-based standards. See CAA section 112(d)(5).

As noted above, CAA section 112(n) requires completion of various reports concerning EGUs. For the first report, the Utility Study, Congress required the EPA to evaluate the hazards to public health reasonably anticipated to occur as the result of HAP emissions from EGUs after imposition of the requirements of the CAA. See CAA section 112(n)(1)(A). The EPA was required to report results from this study to Congress by November 15, 1993. *Id.* Congress also directed the EPA to conduct "a study of mercury emissions from [EGUs], municipal waste combustion units, and other sources, including area sources" (Mercury Study). See CAA section 112(n)(1)(B). The EPA was required to report the results from this study to Congress by November 15, 1994. *Id.* In conducting this Mercury Study, Congress directed the EPA to "consider the rate and mass of such emissions, the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies." *Id.* Congress directed the National Institute of Environmental Health Sciences (NIEHS)

to conduct the last required evaluation, "a study to determine the threshold level of mercury exposure below which adverse human health effects are not expected to occur" (NIEHS Study). See CAA section 112(n)(1)(C). The NIEHS was required to submit the results to Congress by November 15, 1993. *Id.* In conducting this study, NIEHS was to determine "a threshold for mercury concentrations in the tissue of fish which may be consumed (including consumption by sensitive populations) without adverse effects to public health." *Id.*

In addition, Congress, in conference report language associated with the EPA's fiscal year 1999 appropriations, directed the EPA to fund the National Academy of Sciences (NAS) to perform an independent evaluation of the available data related to the health impacts of methylmercury (MeHg) (NAS Study or MeHg Study). H.R. Conf. Rep. No 105–769, at 281–282 (1998). Specifically, Congress required NAS to advise the EPA as to the appropriate reference dose (RfD) for MeHg. 65 FR 79826. The RfD is the amount of a chemical which, when ingested daily over a lifetime, is anticipated to be without adverse health effects to humans, including sensitive subpopulations. In the same conference report, Congress indicated that the EPA should not make the appropriate and necessary regulatory determination for Hg emissions until the EPA had reviewed the results of the NAS Study. See H.R. Conf. Rep. No 105–769, at 281–282 (1998).

As directed by Congress through different vehicles, the NAS Study and the NIEHS Study evaluated the same issues. The NIEHS completed the NIEHS Study in 1995,<sup>3</sup> and the NAS completed the NAS Study in 2000.<sup>4</sup> Because NAS completed its study 5 years after the NIEHS Study, and considered additional information not earlier available to NIEHS, for purposes of this document we discuss the content of the NAS Study as opposed to the NIEHS Study.

The EPA conducted the studies required by CAA section 112(n)(1) concerning utility HAP emissions, the Utility Study and the Mercury Study,<sup>5</sup> and completed both by 1998. Prior to issuance of the Mercury Study, the EPA

<sup>3</sup> NIEHS Study, August 1995; EPA-HQ-OAR-2009-3053.

<sup>4</sup> National Research Council (NAS). 2000. Toxicological Effects of Methylmercury. Committee on the Toxicological Effects of Methylmercury, Board on Environmental Studies and Toxicology, National Research Council.

<sup>5</sup> Mercury Study Report to Congress, December 1997; EPA-HQ-OAR-2009-0234-3054.

<sup>1</sup> "Electric utility steam generating unit" is defined, in part, as any "fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale." See CAA section 112(a)(8).

<sup>2</sup> U.S. EPA. Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units—Final Report to Congress. EPA-453/R-98-004a. February 1998.

engaged in two extensive external peer reviews of the document.

On December 20, 2000, the EPA issued a finding pursuant to CAA section 112(n)(1)(A) that it was appropriate and necessary to regulate coal- and oil-fired EGUs under CAA section 112 and added such units to the list of source categories subject to regulation under CAA section 112(d). In making that finding, the EPA considered the Utility Study, the Mercury Study, the NAS Study, and certain additional information, including information about Hg emissions from coal-fired EGUs that the EPA obtained pursuant to an information collection request (ICR) under the authority of CAA section 114. 65 FR 79826–27.

*B. What is the litigation history of this final rule?*

Shortly after issuance of the December 2000 finding, an industry group challenged that finding in the Court of Appeals for the D.C. Circuit (D.C. Circuit). *Utility Air Regulatory Group (UARG) v. EPA*, 2001 WL 936363, No. 01–1074 (D.C. Cir. July 26, 2001). The D.C. Circuit dismissed the lawsuit holding that it did not have jurisdiction because CAA section 112(e)(4) provides, in pertinent part, that “no action of the Administrator \* \* \* listing a source category or subcategory under subsection (c) of this section shall be a final agency action subject to judicial review, except that any such action may be reviewed under section 7607 of (the CAA) when the Administrator issues emission standards for such pollutant or category.” *Id.* (emphasis added).

Pursuant to a settlement agreement, the deadline for issuing emission standards was March 15, 2005. However, instead of issuing emission standards pursuant to CAA section 112(d), on March 29, 2005, the EPA issued the Section 112(n) Revision Rule (2005 Action). That action delisted EGUs after finding that it was neither appropriate nor necessary to regulate such units under CAA section 112. In addition, on May 18, 2005, the EPA issued the Clean Air Mercury Rule (CAMR). 70 FR 28606. That rule established standards of performance for emissions of Hg from new and existing coal-fired EGUs pursuant to CAA section 111.

Environmental groups, states, and tribes challenged the 2005 Action and CAMR. Among other things, the environmental and state petitioners argued that the EPA could not remove EGUs from the CAA section 112(c) source category list without following the requirements of CAA section 112(c)(9).

On February 8, 2008, the D.C. Circuit vacated both the 2005 Action and CAMR. The D.C. Circuit held that the EPA failed to comply with the requirements of CAA section 112(c)(9) for delisting source categories. Specifically, the D.C. Circuit held that CAA section 112(c)(9) applies to the removal of “any source category” from the CAA section 112(c) list, including EGUs. The D.C. Circuit found that, by enacting CAA section 112(c)(9), Congress limited the EPA’s discretion to reverse itself and remove source categories from the CAA section 112(c) list. The D.C. Circuit found that the EPA’s contrary position would “nullify § 112(c)(9) altogether.” *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008). The D.C. Circuit did not reach the merits of petitioners’ arguments on CAMR, but vacated CAMR for existing sources because coal-fired EGUs were already listed sources under CAA section 112. The D.C. Circuit reasoned that even under the EPA’s own interpretation of the CAA, regulation of existing sources’ Hg emissions under CAA section 111 was prohibited if those sources were a listed source category under CAA section 112.<sup>6</sup> *Id.* The D.C. Circuit vacated and remanded CAMR for new sources because it concluded that the assumptions the EPA made when issuing CAMR for new sources were no longer accurate (*i.e.*, that there would be no CAA section 112 regulation of EGUs and that the CAA section 111 standards would be accompanied by standards for existing sources). *Id.* at 583–84. Thus, CAMR and the 2005 Action became null and void.

On December 18, 2008, several environmental and public health organizations filed a complaint in the U.S. District Court for the District of Columbia.<sup>7</sup> They alleged that the Agency had failed to perform a nondiscretionary duty under CAA section 304(a)(2), by failing to promulgate final CAA section 112(d) standards for HAP from coal- and oil-fired EGUs by the statutorily-mandated deadline, December 20, 2002, 2 years after such sources were listed under

<sup>6</sup> In CAMR and the 2005 Action, EPA interpreted section 111(d) of the Act as prohibiting the Agency from establishing an existing source standard of performance under CAA section 111(d) for any HAP emitted from a particular source category, if the source category is regulated under CAA section 112.

<sup>7</sup> American Nurses Association, Chesapeake Bay Foundation, Inc., Conservation Law Foundation, Environment America, Environmental Defense Fund, Izaak Walton League of America, Natural Resources Council of Maine, Natural Resources Defense Council, Physicians for Social Responsibility, Sierra Club, The Ohio Environmental Council, and Waterkeeper Alliance, Inc. (Civ. No. 1:08–cv–02198 (RMC)).

CAA section 112(c). The EPA settled that litigation. The consent decree resolving the case requires the EPA to sign a notice of proposed rulemaking setting forth the EPA’s proposed CAA section 112(d) emission standards for coal- and oil-fired EGUs by March 16, 2011, and a notice of final rulemaking by December 16, 2011.<sup>8</sup>

*C. What is the relationship between this final rule and other combustion rules?*

1. CAA Section 111

The EPA promulgated revised NSPS for SO<sub>2</sub>, nitrogen oxides (NO<sub>x</sub>), and PM under CAA section 111 for EGUs (40 CFR part 60, subpart Da) and industrial boilers (IB) (40 CFR part 60, subparts Db and Dc) on February 27, 2006 (71 FR 9866). As noted elsewhere, in this action we are finalizing certain amendments to 40 CFR part 60, subpart Da. In developing this final rule, we considered the monitoring, testing, and recordkeeping requirements of the existing and revised NSPS to avoid duplicating requirements to the extent possible.

2. CAA Section 112

The EPA has previously developed other non-EQU combustion-related NESHAP under CAA section 112(d). The EPA promulgated final NESHAP for major source industrial, commercial and institutional boilers and process heaters (IB) and area source industrial, commercial and institutional boilers on March 21, 2011 (40 CFR part 63, subpart DDDDD, 76 FR 15608; and subpart JJJJJ, 76 FR 15249, respectively), and promulgated standards for stationary combustion turbines (CT) on March 5, 2004 (40 CFR part 63 subpart YYYY; 69 FR 10512). In addition to these three NESHAP, on March 21, 2011, the EPA also promulgated final CAA section 129 standards for commercial and institutional solid waste incineration (CISWI) units, including energy recovery units (40 CFR part 60, subparts CCCC (NSPS) and DDDD (emission guidelines); 76 FR 15704); and a definition of non-hazardous secondary materials that are solid waste (Non-hazardous Solid Waste Definition Rule (40 CFR part 241, subpart B; 76 FR 15456)). Electric generating units and IB

<sup>8</sup> The consent decree originally required EPA to sign a notice of final rulemaking no later than November 16, 2011; however, on October 21, 2011, pursuant to paragraph 6 of the consent decree, the parties agreed to a 30-day extension of the final rule deadline. As stated in the stipulation memorializing the extension, the parties agreed to the extension of 30 days because EPA provided an additional 30 days for public comment and the time was necessary to respond to comments submitted on the proposed rule.

that combust fossil fuel and solid waste, as that term is defined by the Administrator pursuant to the Resource Conservation and Recovery Act (RCRA), see 76 FR 15456, will be subject to standards issued pursuant to CAA section 129 (e.g., CISWI), unless they meet one of the exemptions in CAA section 129(g)(1). Clean Air Act section 129 standards are discussed in more detail below.

The two IB (Boiler) NESHAP, the CT NESHAP, and this final rule will regulate HAP emissions from sources that combust fossil fuels for electrical power, process operations, or heating. The differences among these rules are due to the size of the units (megawatt (MW), megawatt-electric (MWe), or British thermal unit per hour (Btu/hr)), the boiler/furnace technology, and/or the portion of their electrical output (if any) for sale to any utility power distribution systems.

Pursuant to the CAA, an EGU is "any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale shall be considered an electric utility steam generating unit." CAA section 112(a)(8). We consider all of the MW ratings quoted in the final rule to be the original rated nameplate capacity of the unit. We consider cogeneration to be the simultaneous production of power (electricity) and another form of useful thermal energy (usually steam or hot water) from a single fuel-consuming process.

We consider any combustion unit, regardless of size, that produces steam to serve a generator that produces electricity exclusively for industrial, commercial, or institutional purposes (i.e., makes no sales to the national electrical distribution grid) to be an IB unit. We do not consider a fossil fuel-fired combustion unit that serves a generator that produces electricity for sale to be an EGU under the final rule if the size of the combustion unit is less than or equal to 25 MW. Units that are 25 MW or less are likely subject to one of the two Boiler NESHAP.

Because of the combustion technology of simple-cycle and combined-cycle stationary CTs (with the exception of integrated gasification combined cycle (IGCC) units that burn gasified coal or petroleum coke synthesis gas/syngas),

we do not consider these CTs to be EGUs for purposes of this final rule.<sup>9</sup>

The December 2000 listing discussed above did not list natural gas-fired EGUs. Thus, this final rule does not regulate a unit that otherwise meets the CAA section 112(a)(8) definition of an EGU but that combusts natural gas exclusively or natural gas in combination with another fossil fuel where the natural gas constitutes 90.0 percent or more of the average annual heat input during any 3 consecutive calendar years or 85.0 percent or more of the annual heat input in one calendar year. We consider such units to be natural gas-fired EGUs notwithstanding the combustion of some coal or oil (or derivative thereof) and such units are not subject to this final rule.

The CAA does not define the terms "fossil fuel-fired" and "fossil fuel." In this rule, we are finalizing definitions for both terms for purposes of this rule. The definition of "fossil fuel-fired" will help determine the applicability of the final rule to combustion units that sell electricity to the utility power distribution system. The definition of "fossil fuel-fired" establishes the amount of fossil fuel combustion necessary to make a unit "fossil fuel-fired" and hence potentially subject to this final rule. These definitions will help determine applicability of the final rule to units that primarily fire non-fossil fuels (e.g., biomass) but generally start up using either natural gas or distillate oil and may use these fuels (or coal) during normal operation for flame stabilization.

In addition, the EPA is finalizing in the definition of "fossil fuel-fired" that, among other things, an EGU must fire coal or oil for more than 10.0 percent of the average annual heat input during any 3 consecutive calendar years or for more than 15.0 percent of the annual heat input during any one calendar year after the applicable compliance date in order to be considered a fossil fuel-fired EGU subject to this final rule. The EPA has based these threshold percentage values on the definition of "oil-fired" in the Acid Rain Program (ARP) found at 40 CFR 72.2. Though the EPA does not have annual heat input data for, for example, biomass co-fired EGUs because their use is not yet commonplace, we believe this definition accounts for the use of fossil fuels for flame stabilization use without inappropriately subjecting such units to this final rule.

<sup>9</sup> The CT NESHAP regulates HAP emissions from all simple-cycle and combined-cycle stationary CTs producing electricity or steam for any purpose.

Units that do not meet the EGU definition will in most cases be considered IB units subject to one of the two Boiler NESHAP. Thus, for example, a biomass-fired EGU, regardless of size, that utilizes fossil fuels for startup and flame stabilization purposes only (i.e., less than or equal to 10.0 percent of the average annual heat input in any 3 consecutive calendar years or less than or equal to 15.0 percent of the annual heat input during any one calendar year) is not considered to be a fossil fuel-fired EGU under this final rule.

A cogeneration facility that sells electricity to any utility power distribution system equal to more than one-third of its potential electric output capacity and more than 25 MW will be considered an EGU if the facility is fossil fuel-fired as that term is defined in the final rule.

We recognize that different CAA section 112 rules may impact a particular unit at different times. For example, the Boiler NESHAP may cover some cogeneration units. Such a unit may decide to increase or decrease the proportion of production output it supplies to the electric utility grid, thus causing the unit to meet the EGU cogeneration criteria (i.e., greater than one-third of its potential output capacity and greater than 25 MW). A unit subject to one of the Boiler NESHAP that increases its electricity output and meets the definition of an EGU would be subject to the final EGU NESHAP.

Another rule intersection may occur where one or more coal- or oil-fired EGU(s) share an air pollution control device (APCD) and/or an exhaust stack with one or more similarly-fueled IB unit(s). To demonstrate compliance with two different rules, either the emissions would need to be apportioned to the appropriate source or the more stringent emission limit would need to be met. Data needed to apportion emissions are not currently required by this final rule or the final boiler NESHAP and are not otherwise available. Therefore, the EPA is finalizing the requirement to comply with the more stringent emission limit.

### 3. CAA Section 129

Clean Air Act section 129 regulates units that combust "non-hazardous secondary materials," as that term is defined by the Administrator under the Resource Conservation and Recovery Act (RCRA), that are "solid wastes." On March 21, 2011, the EPA promulgated the final Non-Hazardous Solid Waste Definition Rule (76 FR 15456). Any EGU that combusts any solid waste as defined in that final rule is a solid waste

incineration unit subject to emissions standards under CAA section 129.

In the Non-Hazardous Solid Waste Definition Rule, the EPA determined that coal refuse from current mining operations is not considered to be a "solid waste" if it is not discarded. Coal refuse that is in legacy coal refuse piles is considered a "solid waste" because it has been discarded. However, if discarded coal refuse is processed in the same manner as currently mined coal refuse, the coal refuse would not be considered a solid waste but instead would be considered a product fossil fuel. Therefore, the combustion of such material by a combustion unit would not subject that unit to regulation under CAA section 129. Instead, the unit would be subject to this final rule if it meets the definition of EGU. In the proposed rule, we assumed that all units that combust coal refuse and otherwise meet the definition of a coal-fired EGU are in fact combusting newly mined coal refuse or coal refuse from legacy piles that has been processed such that it is not a solid waste. We did not receive any information since proposal that would cause us to revise this determination in the final rule.

Further, CAA section 129(g)(1)(B) exempts from regulation

"\* \* \* qualifying small power production facilities, as defined in section 796(17)(C) of Title 16, or qualifying cogeneration facilities, as defined in section 796(18)(B) of Title 16, which burn homogeneous waste \* \* \* 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 \* \* \*"

If the "homogeneous waste" material that such facilities combust is also a fossil fuel, and those facilities otherwise meet the definition of an EGU under CAA section 112(a)(8), then those facilities are exempt from regulation under CAA section 129 but covered under this final rule. For example, a qualifying small power production facility or cogeneration facility combusting only coal refuse that is a solid waste and a "homogenous waste," as that term is defined in the final CAA section 129 CISWI standards, would be subject to this final rule if the unit also met the definition of EGU.

#### *D. What are the health effects of pollutants emitted from coal- and oil-fired EGUs?*

This final rule protects air quality and promotes public health by reducing emissions of some of the HAP listed in CAA section 112(b)(1). Utilities are by

far the largest anthropogenic source of Hg in the U.S. In addition, EGUs are the largest source of HCl, hydrogen fluoride (HF), and selenium (Se) emissions, and a major source of metallic HAP emissions including As, chromium (Cr), Ni, and others. The discrepancy is even greater now that almost all other major source categories have been required to control Hg and other HAP under CAA section 112. In 2005, U.S. EGUs emitted 50 percent of total domestic anthropogenic Hg emissions, 62 percent of total As emissions, 39 percent of total cadmium (Cd) emissions, 22 percent of total Cr emissions, 82 percent of total HCl emissions, 62 percent of total HF emissions, 28 percent of total Ni emissions, and 83 percent of total Se emissions.<sup>10</sup> Exposure to these HAP, depending on exposure duration and levels of exposures, is associated with a variety of adverse health effects. These adverse health effects may include chronic health disorders (e.g., irritation of the lung, skin, and mucus membranes; detrimental effects on the central nervous system; damage to the kidneys; and alimentary effects such as nausea and vomiting). Two of the HAP are classified as human carcinogens (As and CrVI) and two as probable human carcinogens (Cd and Ni). See 76 FR 25003–25005 for a fuller discussion of the health effects associated with these pollutants.

### **III. Appropriate and Necessary Finding**

#### *A. Overview*

In December 2000, the EPA issued a finding pursuant to CAA section 112(n)(1)(A) that it was appropriate and necessary to regulate coal- and oil-fired EGUs under CAA section 112 and added such units to the list of source categories subject to regulation under section 112(d). The EPA found that it was appropriate to regulate HAP emissions from coal- and oil-fired EGUs because, among other reasons, Hg is a hazard to public health, and U.S. EGUs are the largest domestic source of Hg emissions. The EPA also found it appropriate to regulate HAP emissions from EGUs because it had identified certain control options that would effectively reduce HAP emissions from U.S. EGUs. The EPA found that it was necessary to regulate HAP emissions from U.S. EGUs under section 112 because the implementation of other requirements under the CAA will not adequately address the serious public health and environmental hazards arising from HAP emissions from U.S. EGUs and that

CAA section 112 is intended to address HAP emissions. See 76 FR 24984–20985 (for further discussion of 2000 finding).

Because several years had passed since the 2000 finding, the EPA performed additional technical analyses for the proposed rule, even though those analyses were not required. These analyses included a national-scale Hg risk assessment focused on populations with high levels of self-caught fish consumption, and a set of 16 case studies of inhalation cancer risks for non-Hg HAP. The analyses confirm that it remains appropriate and necessary to regulate U.S. EGUs under section 112.

In the preamble to the proposed rule, the EPA reported the results of those additional technical analyses. Those analyses confirmed the 2000 finding that it is appropriate to regulate U.S. EGUs under section 112 by demonstrating that (1) Hg continues to pose a hazard to public health because up to 28 percent of watersheds were estimated to have Hg deposition attributable to U.S. EGUs that contributes to potential exposures above the reference dose for methylmercury (MeHg RfD), a level above which there is increased risk of neurological effects in children, (2) non-Hg HAP emissions pose a hazard to public health because case studies at 16 facilities demonstrated that lifetime cancer risks at 4 of the facilities exceed 1 in 1 million, and (3) U.S. EGUs remain the largest domestic source of Hg emissions and several HAP (e.g., HF, Se, HCl), and are among the largest contributors for other HAP (e.g., As, Cr, Ni, HCN). Thus, in the preamble to the proposed rule, the EPA found that Hg and non-Hg HAP emissions from U.S. EGUs pose hazards to public health, which confirmed the 2000 finding and demonstrated that it remains appropriate to regulate U.S. EGUs under section 112.

In the preamble to the proposed rule, the EPA also found that it is appropriate to regulate U.S. EGUs because (1) Hg emissions pose a hazard to the environment and wildlife, adversely impacting species of fish-eating birds and mammals, (2) acid gas HAP pose a hazard to the environment because they contribute to aquatic acidification, and (3) effective controls are available to reduce Hg and non-Hg HAP emissions from U.S. EGUs.

The additional analyses reported in the preamble to the proposed rule also confirmed that it remains necessary to regulate U.S. EGU under CAA section 112. These analyses demonstrated that (1) Hg emissions from U.S. EGUs remaining in 2016 are reasonably anticipated to pose a hazard to public health after imposition of other CAA

<sup>10</sup> From 2005 National-Scale Air Toxics Assessment (NATA), available at <http://www.epa.gov/ttn/atw/nata2005/>.

## General Compliance Requirements

### § 63.10000 What are my general requirements for complying with this subpart?

(a) You must be in compliance with the emission limits and operating limits in this subpart. These limits apply to you at all times except during periods of startup and shutdown; however, for coal-fired, liquid oil-fired, or solid oil-derived fuel-fired EGUs, you are required to meet the work practice requirements in Table 3 to this subpart during periods of startup or shutdown.

(b) At all times you must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. Determination of whether such operation and maintenance procedures are being used will be based on information available to the EPA Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

(c)(1) For coal-fired units and solid oil-derived fuel-fired units, initial performance testing is required for all pollutants, to demonstrate compliance with the applicable emission limits.

(i) For a coal-fired or solid oil-derived fuel-fired EGU or IGCC EGU, you may conduct the initial performance testing in accordance with § 63.10005(h), to determine whether the unit qualifies as a low emitting EGU (LEE) for one or more applicable emissions limits, with two exceptions:

(A) You may not pursue the LEE option if your coal-fired, IGCC, or solid oil-derived fuel-fired EGU is equipped with an acid gas scrubber and has a main stack and bypass stack exhaust configuration, and

(B) You may not pursue the LEE option for Hg if your coal-fired, solid oil-fired fuel fired EGU or IGCC EGU is new.

(ii) For a qualifying LEE for Hg emissions limits, you must conduct a 30-day performance test using Method 30B at least once every 12 calendar months to demonstrate continued LEE status.

(iii) For a qualifying LEE of any other applicable emissions limits, you must conduct a performance test at least once every 36 calendar months to demonstrate continued LEE status.

(iv) If your coal-fired or solid oil-derived fuel-fired EGU or IGCC EGU does not qualify as a LEE for total non-mercury HAP metals, individual non-

mercury HAP metals, or filterable particulate matter (PM), you must demonstrate compliance through an initial performance test and you must monitor continuous performance through either use of a particulate matter continuous parametric monitoring system (PM CPMS), a PM CEMS, or compliance performance testing repeated quarterly.

(A) If you elect to use PM CPMS, you will establish a site-specific operating limit corresponding to the results of the performance test demonstrating compliance with the pollutant with which you choose to comply: total non-mercury HAP metals, individual non-mercury HAP metals or filterable PM. You will use the PM CPMS to demonstrate continuous compliance with this operating limit. If you elect to use a PM CPMS, you must repeat the performance test annually for the selected pollutant limit and reassess and adjust the site-specific operating limit in accordance with the results of the performance test.

(B) You may also opt to install and operate a particulate matter CEMS certified in accordance with Performance Specification 11 and Procedure 2 of 40 CFR part 60, Appendices B and F, respectively, in accordance with § 63.10010(i).

(v) If your coal-fired or solid oil-derived fuel-fired EGU does not qualify as a LEE for hydrogen chloride (HCl), you may demonstrate initial and continuous compliance through use of an HCl CEMS, installed and operated in accordance with Appendix B to this subpart. As an alternative to HCl CEMS, you may demonstrate initial and continuous compliance by conducting an initial and periodic quarterly performance stack test for HCl. If your EGU uses wet or dry flue gas desulfurization technology (this includes limestone injection into a fluidized bed combustion unit), you may apply a second alternative to HCl CEMS by installing and operating a sulfur dioxide (SO<sub>2</sub>) CEMS installed and operated in accordance with part 75 of this chapter to demonstrate compliance with the applicable SO<sub>2</sub> emissions limit.

(vi) If your coal-fired or solid oil-derived fuel-fired EGU does not qualify as a LEE for Hg, you must demonstrate initial and continuous compliance through use of a Hg CEMS or a sorbent trap monitoring system, in accordance with appendix A to this subpart.

(2) For liquid oil-fired EGUs, except limited use liquid oil-fired EGUs, initial performance testing is required for all pollutants, to demonstrate compliance with the applicable emission limits.

(i) For an existing liquid oil-fired unit, you may conduct the performance testing in accordance with § 63.10005(h), to determine whether the unit qualifies as a LEE for one or more pollutants. For a qualifying LEE for Hg emissions limits, you must conduct a 30-day performance test using Method 30B at least once every 12 calendar months to demonstrate continued LEE status. For a qualifying LEE of any other applicable emissions limits, you must conduct a performance test at least once every 36 calendar months to demonstrate continued LEE status.

(ii) If your existing liquid oil-fired unit does not qualify as a LEE for total HAP metals (including mercury), individual metals (including mercury), or filterable PM you must demonstrate compliance through an initial performance test and you must monitor continuous performance through either use of a PM CPMS, a PM CEMS, or performance testing conducted quarterly.

(A) If you elect to use PM CPMS, you will establish a site-specific operating limit corresponding to the results of the performance test demonstrating compliance with the pollutant with which you choose to comply: total HAP metals, individual HAP metals, or filterable PM. You will use the PM CPMS to demonstrate continuous compliance with this operating limit. If you elect to use a PM CPMS, you must repeat the performance test at least annually for the selected pollutant limit and reassess and adjust the site-specific operating limit in accordance with the results of the performance test.

(B) If you elect to use a PM CEMS, you will use the CEMS in accordance with § 63.10010(i) to demonstrate initial and continuous compliance with the filterable PM emission limit.

(iii) If your existing liquid oil-fired unit does not qualify as a LEE for hydrogen chloride (HCl) or for hydrogen fluoride (HF), you may demonstrate initial and continuous compliance through use of an HCl CEMS, an HF CEMS, or an HCl and HF CEMS, installed and operated in accordance with Appendix B to this rule. As an alternative to HCl CEMS, HF CEMS, or HCl and HF CEMS, you may demonstrate initial and continuous compliance by conducting periodic quarterly performance stack tests for HCl and HF. If you elect to demonstrate compliance through quarterly performance testing, then you must also develop a site-specific monitoring plan to ensure that the operations of the unit remain consistent with those during the performance test. As another alternative, you may measure or obtain, and keep

records of, fuel moisture content; as long as fuel moisture does not exceed 1.0 percent by weight, you need not conduct other HCl or HF monitoring or testing.

(iv) If your unit qualifies as a limited-use liquid oil-fired as defined in § 63.10042, then you are not subject to the emission limits in Tables 1 and 2, but must comply with the performance tune-up work practice requirements in Table 3.

(d)(1) If you demonstrate compliance with any applicable emissions limit through use of a continuous monitoring system (CMS), where a CMS includes a continuous parameter monitoring system (CPMS) as well as a continuous emissions monitoring system (CEMS), you must develop a site-specific monitoring plan and submit this site-specific monitoring plan, if requested, at least 60 days before your initial performance evaluation (where applicable) of your CMS. This requirement also applies to you if you petition the Administrator for alternative monitoring parameters under § 63.8(f). This requirement to develop and submit a site-specific monitoring plan does not apply to affected sources with existing monitoring plans that apply to CEMS and CPMS prepared under Appendix B to part 60 or part 75 of this chapter, and that meet the requirements of § 63.10010. Using the process described in § 63.8(f)(4), you may request approval of monitoring system quality assurance and quality control procedures alternative to those specified in this paragraph of this section and, if approved, include those in your site-specific monitoring plan. The monitoring plan must address the provisions in paragraphs (d)(2) through (5) of this section.

(2) The site-specific monitoring plan shall include the information specified in paragraphs (d)(5)(i) through (d)(5)(vii) of this section. Alternatively, the requirements of paragraphs (d)(5)(i) through (d)(5)(vii) are considered to be met for a particular CMS or sorbent trap monitoring system if:

(i) The CMS or sorbent trap monitoring system is installed, certified, maintained, operated, and quality-assured either according to part 75 of this chapter, or appendix A or B to this subpart; and

(ii) The recordkeeping and reporting requirements of part 75 of this chapter, or appendix A or B to this subpart, that pertain to the CMS are met.

(3) If requested by the Administrator, you must submit the monitoring plan (or relevant portion of the plan) at least 60 days before the initial performance evaluation of a particular CMS, except

where the CMS has already undergone a performance evaluation that meets the requirements of § 63.10010 (e.g., if the CMS was previously certified under another program).

(4) You must operate and maintain the CMS according to the site-specific monitoring plan.

(5) The provisions of the site-specific monitoring plan must address the following items:

(i) Installation of the CEMS or sorbent trap monitoring system sampling probe or other interface at a measurement location relative to each affected process unit such that the measurement is representative of control of the exhaust emissions (e.g., on or downstream of the last control device). See § 63.10010(a) for further details. For CPMS installations, follow the procedures in § 63.10010(h).

(ii) Performance and equipment specifications for the sample interface, the pollutant concentration or parametric signal analyzer, and the data collection and reduction systems.

(iii) Schedule for conducting initial and periodic performance evaluations.

(iv) Performance evaluation procedures and acceptance criteria (e.g., calibrations), including ongoing data quality assurance procedures in accordance with the general requirements of § 63.8(d).

(v) On-going operation and maintenance procedures, in accordance with the general requirements of §§ 63.8(c)(1)(ii), (c)(3), and (c)(4)(ii).

(vi) Conditions that define a CMS that is out of control consistent with § 63.8(c)(7)(i) and for responding to out of control periods consistent with § 63.8(c)(7)(ii) and (c)(8).

(vii) On-going recordkeeping and reporting procedures, in accordance with the general requirements of §§ 63.10(c), (e)(1), and (e)(2)(i), or as specifically required under this subpart.

(e) As part of your demonstration of continuous compliance, you must perform periodic tune-ups of your EGU(s), according to § 63.10021(e).

(f) You are subject to the requirements of this subpart for at least 6 months following the last date you met the definition of an EGU subject to this subpart (e.g., 6 months after a cogeneration unit provided more than one third of its potential electrical output capacity and more than 25 megawatts electrical output to any power distributions system for sale). You may opt to remain subject to the provisions of this subpart beyond 6 months after the last date you met the definition of an EGU subject to this subpart, unless you are a solid waste incineration unit subject to standards

under CAA section 129 (e.g., 40 CFR part 60, subpart CCCC (New Source Performance Standards (NSPS) for Commercial and Industrial Solid Waste Incineration Units, or Subpart DDDD (Emissions Guidelines (EG) for Existing Commercial and Industrial Solid Waste Incineration Units). Notwithstanding the provisions of this subpart, an EGU that starts combusting solid waste is immediately subject to standards under CAA section 129 and the EGU remains subject to those standards until the EGU no longer meets the definition of a solid waste incineration unit consistent with the provisions of the applicable CAA section 129 standards.

(g) If you no longer meet the definition of an EGU subject to this subpart you must be in compliance with any newly applicable standards on the date you are no longer subject to this subpart. The date you are no longer subject to this subpart is a date selected by you, that must be at least 6 months from the date that you last met the definition of an EGU subject to this subpart or the date you begin combusting solid waste, consistent with § 63.9983(d). Your source must remain in compliance with this subpart until the date you select to cease complying with this subpart or the date you begin combusting solid waste, whichever is earlier.

(h)(1) If you own or operate an EGU that does not meet the definition of an EGU subject to this subpart on April 16, 2015, and you commence or recommence operations that cause you to meet the definition of an EGU subject to this subpart, you are subject to the provisions of this subpart, including, but not limited to, the emission limitations and the monitoring requirements, as of the first day you meet the definition of an EGU subject to this subpart. You must complete all initial compliance demonstrations for this subpart applicable to your EGU within 180 days after you commence or recommence operations that cause you to meet the definition of an EGU subject to this subpart.

(2) You must provide 30 days prior notice of the date you intend to commence or recommence operations that cause you to meet the definition of an EGU subject to this subpart. The notification must identify:

(i) The name of the owner or operator of the EGU, the location of the facility, the unit(s) that will commence or recommence operations that will cause the unit(s) to meet the definition of an EGU subject to this subpart, and the date of the notice;

(ii) The 40 CFR part 60, part 62, or part 63 subpart and subcategory

currently applicable to your unit(s), and the subcategory of this subpart that will be applicable after you commence or recommence operation that will cause the unit(s) to meet the definition of an EGU subject to this subpart;

(iii) The date on which you became subject to the currently applicable emission limits;

(iv) The date upon which you will commence or recommence operations that will cause your unit to meet the definition of an EGU subject to this subpart, consistent with paragraph (f) of this section.

(i)(1) If you own or operate an EGU subject to this subpart, and it has been at least 6 months since you operated in a manner that caused you to meet the definition of an EGU subject to this subpart, you may, consistent with paragraph (g) of this section, select the date on which your EGU will no longer be subject to this subpart. You must be in compliance with any newly applicable section 112 or 129 standards on the date you selected.

(2) You must provide 30 days prior notice of the date your EGU will cease complying with this subpart. The notification must identify:

(i) The name of the owner or operator of the EGU(s), the location of the facility, the EGU(s) that will cease complying with this subpart, and the date of the notice;

(ii) The currently applicable subcategory under this subpart, and any 40 CFR part 60, part 62, or part 63 subpart and subcategory that will be applicable after you cease complying with this subpart;

(iii) The date on which you became subject to this subpart;

(iv) The date upon which you will cease complying with this subpart, consistent with paragraph (g) of this section.

(j) All air pollution control equipment necessary for compliance with any newly applicable emissions limits which apply as a result of the cessation or commencement or recommencement of operations that cause your EGU to meet the definition of an EGU subject to this subpart must be installed and operational as of the date your source ceases to be or becomes subject to this subpart.

(k) All monitoring systems necessary for compliance with any newly applicable monitoring requirements which apply as a result of the cessation or commencement or recommencement of operations that cause your EGU to meet the definition of an EGU subject to this subpart must be installed and operational as of the date your source ceases to be or becomes subject to this

subpart. All calibration and drift checks must be performed as of the date your source ceases to be or becomes subject to this subpart. You must also comply with provisions of §§ 63.10010, 63.10020, and 63.10021 of this subpart. Relative accuracy tests must be performed as of the performance test deadline for PM CEMS, if applicable. Relative accuracy testing for other CEMS need not be repeated if that testing was previously performed consistent with CAA section 112 monitoring requirements or monitoring requirements under this subpart.

**§ 63.10001 Affirmative defense for exceedance of emission limit during malfunction.**

In response to an action to enforce the standards set forth in § 63.9991 you may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by malfunction, as defined at 40 CFR 63.2. Appropriate penalties may be assessed, however, if you fail to meet your burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The excess emissions:

(i) Were caused by a sudden, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner, and

(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and

(4) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life,

personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health; and

(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(b) *Notification.* The owner or operator of the affected source experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile (FAX) transmission as soon as possible, but no later than two business days after the initial occurrence of the malfunction or, if it is not possible to determine within two business days whether the malfunction caused or contributed to an exceedance, no later than two business days after the owner or operator knew or should have known that the malfunction caused or contributed to an exceedance, but, in no event later than two business days after the end of the averaging period, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 45 days of the initial occurrence of the exceedance of the standard in § 63.9991 to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (a) of this section. The owner or operator may seek an extension of this deadline for up to 30 additional days by submitting a written request to the Administrator before the expiration of the 45 day period. Until a request for an extension has been approved by the Administrator, the owner or operator is subject to the requirement to submit such report



TABLE 2 TO SUBPART UUUUU OF PART 63—EMISSION LIMITS FOR EXISTING EGUS—Continued

[As stated in § 63.9991, you must comply with the following applicable emission limits]<sup>1</sup>

| If your EGU is in this subcategory   | For the following pollutants   | You must meet the following emission limits and work practice standards   | Using these requirements, as appropriate (e.g., specified sampling volume or test run duration) and limitations with the test methods in Table 5  |
|--|--|---|---|
|  | Individual HAP metals:<br>Antimony (Sb) .....<br>Arsenic (As) .....<br>Beryllium (Be) .....<br>Cadmium (Cd) .....<br>Chromium (Cr) .....<br>Cobalt (Co) .....<br>Lead (Pb) .....<br>Manganese (Mn) .....<br>Nickel (Ni) .....<br>Selenium (Se) .....<br>b. Hydrogen chloride (HCl) .....<br><br>OR<br>Sulfur dioxide (SO <sub>2</sub> ) <sup>4</sup> .....<br><br>c. Mercury (Hg) .....                                    | .....<br>8.0E-1 lb/TBtu or 8.0E-3 lb/GWh.<br>1.1E0 lb/TBtu or 2.0E-2 lb/GWh.<br>2.0E-1 lb/TBtu or 2.0E-3 lb/GWh.<br>3.0E-1 lb/TBtu or 3.0E-3 lb/GWh.<br>2.8E0 lb/TBtu or 3.0E-2 lb/GWh.<br>8.0E-1 lb/TBtu or 8.0E-3 lb/GWh.<br>1.2E0 lb/TBtu or 2.0E-2 lb/GWh.<br>4.0E0 lb/TBtu or 5.0E-2 lb/GWh.<br>3.5E0 lb/TBtu or 4.0E-2 lb/GWh.<br>5.0E0 lb/TBtu or 6.0E-2 lb/GWh.<br>2.0E-3 lb/MMBtu or 2.0E-2 lb/MWh.<br><br>2.0E-1 lb/MMBtu or 1.5E0 lb/MWh.<br>4.0E0 lb/TBtu or 4.0E-2 lb/GWh ..   | Collect a minimum of 3 dscm per run.<br><br>For Method 26A, collect a minimum of 0.75 dscm per run; for Method 26, collect a minimum of 120 liters per run.<br>For ASTM D6348-03 <sup>3</sup> or Method 320, sample for a minimum of 1 hour.<br><br>SO <sub>2</sub> CEMS.<br><br>LEE Testing for 30 days with 10 days maximum per Method 30B run or Hg CEMS or sorbent trap monitoring system only.   |
| 3. IGCC unit .....   | a. Filterable particulate matter (PM).<br>OR<br>Total non-Hg HAP metals .....<br><br>OR<br>Individual HAP metals: .....<br>Antimony (Sb) .....<br>Arsenic (As) .....<br>Beryllium (Be) .....<br>Cadmium (Cd) .....<br>Chromium (Cr) .....<br>Cobalt (Co) .....<br>Lead (Pb) .....<br><br>Manganese (Mn) .....<br>Nickel (Ni) .....<br>Selenium (Se) .....<br>b. Hydrogen chloride (HCl) .....<br><br>c. Mercury (Hg) ..... | 4.0E-2 lb/MMBtu or 4.0E-1 lb/MWh <sup>2</sup> .<br>OR<br>6.0E-5 lb/MMBtu or 5.0E-1 lb/GWh.<br>OR<br>.....<br>1.4E0 lb/TBtu or 2.0E-2 lb/GWh.<br>1.5E0 lb/TBtu or 2.0E-2 lb/GWh.<br>1.0E-1 lb/TBtu or 1.0E-3 lb/GWh.<br>1.5E-1 lb/TBtu or 2.0E-3 lb/GWh.<br>2.9E0 lb/TBtu or 3.0E-2 lb/GWh.<br>1.2E0 lb/TBtu or 2.0E-2 lb/GWh.<br>1.9E+2 lb/MMBtu or 1.8E0 lb/MWh.<br>2.5E0 lb/TBtu or 3.0E-2 lb/GWh.<br>6.5E0 lb/TBtu or 7.0E-2 lb/GWh.<br>2.2E+1 lb/TBtu or 3.0E-1 lb/GWh.<br>5.0E-4 lb/MMBtu or 5.0E-3 lb/MWh.<br><br>2.5E0 lb/TBtu or 3.0E-2 lb/GWh .. | Collect a minimum of 1 dscm per run.<br><br>Collect a minimum of 1 dscm per run.<br><br>Collect a minimum of 2 dscm per run.<br><br>For Method 26A, collect a minimum of 1 dscm per run; for Method 26, collect a minimum of 120 liters per run.<br>For ASTM D6348-03 <sup>3</sup> or Method 320, sample for a minimum of 1 hour.<br>LEE Testing for 30 days with 10 days maximum per Method 30B run or Hg CEMS or sorbent trap monitoring system only. |
| 4. Liquid oil-fired unit—continental (excluding limited-use liquid oil-fired subcategory units). | a. Filterable particulate matter (PM).<br>OR<br>Total HAP metals .....<br><br>OR<br>Individual HAP metals .....  | 3.0E-2 lb/MMBtu or 3.0E-1 lb/MWh <sup>2</sup> .<br>OR<br>8.0E-4 lb/MMBtu or 8.0E-3 lb/MWh.<br>OR<br>.....   | Collect a minimum of 1 dscm per run.<br><br>Collect a minimum of 1 dscm per run.<br><br>Collect a minimum of 1 dscm per run.  |

TABLE 2 TO SUBPART UUUUU OF PART 63—EMISSION LIMITS FOR EXISTING EGUs—Continued

[As stated in § 63.9991, you must comply with the following applicable emission limits]<sup>1</sup>

| If your EGU is in this subcategory   | For the following pollutants  | You must meet the following emission limits and work practice standards  | Using these requirements, as appropriate (e.g., specified sampling volume or test run duration) and limitations with the test methods in Table 5   |
|--|---|--|--|
|  | Antimony (Sb) .....<br>Arsenic (As) .....<br>Beryllium (Be) .....<br>Cadmium (Cd) .....<br>Chromium (Cr) .....<br>Cobalt (Co) .....<br>Lead (Pb) .....<br>Manganese (Mn) .....<br>Nickel (Ni) .....<br>Selenium (Se) .....<br>Mercury (Hg) .....<br><br>b. Hydrogen chloride (HCl) .....<br><br>c. Hydrogen fluoride (HF) .....   | 1.3E+1 lb/TBtu or 2.0E-1 lb/GWh.<br>2.8E0 lb/TBtu or 3.0E-2 lb/GWh.<br>2.0E-1 lb/TBtu or 2.0E-3 lb/GWh.<br>3.0E-1 lb/TBtu or 2.0E-3 lb/GWh.<br>5.5E0 lb/TBtu or 6.0E-2 lb/GWh.<br>2.1E+1 lb/TBtu or 3.0E-1 lb/GWh.<br>8.1E0 lb/TBtu or 8.0E-2 lb/GWh.<br>2.2E+1 lb/TBtu or 3.0E-1 lb/GWh.<br>1.1E+2 lb/TBtu or 1.1E0 lb/GWh.<br>3.3E0 lb/TBtu or 4.0E-2 lb/GWh.<br>2.0E-1 lb/TBtu or 2.0E-3 lb/GWh<br><br>2.0E-3 lb/MMBtu or 1.0E-2 lb/MWh.<br><br>4.0E-4 lb/MMBtu or 4.0E-3 lb/MWh.   | For Method 30B sample volume determination (Section 8.2.4), the estimated Hg concentration should nominally be < 1/2 the standard.<br>For Method 26A, collect a minimum of 1 dscm per run; for Method 26, collect a minimum of 120 liters per run.<br>For ASTM D6348-03 <sup>3</sup> or Method 320, sample for a minimum of 1 hour.<br>For Method 26A, collect a minimum of 1 dscm per run; for Method 26, collect a minimum of 120 liters per run.<br>For ASTM D6348-03 <sup>3</sup> or Method 320, sample for a minimum of 1 hour.   |
| 5. Liquid oil-fired unit—non-continental (excluding limited-use liquid oil-fired subcategory units). | a. Filterable particulate matter (PM).<br>OR<br>Total HAP metals .....<br>OR<br>Individual HAP metals .....<br><br>Antimony (Sb) .....<br>Arsenic (As) .....<br>Beryllium (Be) .....<br>Cadmium (Cd) .....<br>Chromium (Cr) .....<br>Cobalt (Co) .....<br>Lead (Pb) .....<br>Manganese (Mn) .....<br>Nickel (Ni) .....<br>Selenium (Se) .....<br>Mercury (Hg) .....<br><br>Hydrogen chloride (HCl) .....<br><br>c. Hydrogen fluoride (HF) ..... | 3.0E-2 lb/MMBtu or 3.0E-1 lb/MWh <sup>2</sup> .<br><br>OR<br>6.0E-4 lb/MMBtu or 7.0E-3 lb/MWh.<br>OR<br>.....<br><br>2.2E0 lb/TBtu or 2.0E-2 lb/GWh.<br>4.3E0 lb/TBtu or 8.0E-2 lb/GWh.<br>6.0E-1 lb/TBtu or 3.0E-3 lb/GWh.<br>3.0E-1 lb/TBtu or 3.0E-3 lb/GWh.<br>3.1E+1 lb/TBtu or 3.0E-1 lb/GWh.<br>1.1E+2 lb/TBtu or 1.4E0 lb/GWh.<br>4.9E0 lb/TBtu or 8.0E-2 lb/GWh.<br>2.0E+1 lb/TBtu or 3.0E-1 lb/GWh.<br>4.7E+2 lb/TBtu or 4.1E0 lb/GWh.<br>9.8E0 lb/TBtu or 2.0E-1 lb/GWh.<br>4.0E-2 lb/TBtu or 4.0E-4 lb/GWh<br><br>2.0E-4 lb/MMBtu or 2.0E-3 lb/MWh.<br><br>6.0E-5 lb/MMBtu or 5.0E-4 lb/MWh. | Collect a minimum of 1 dscm per run.<br><br>Collect a minimum of 1 dscm per run.<br><br>Collect a minimum of 2 dscm per run.<br><br>For Method 30B sample volume determination (Section 8.2.4), the estimated Hg concentration should nominally be < 1/2 the standard.<br>For Method 26A, collect a minimum of 1 dscm per run; for Method 26, collect a minimum of 120 liters per run.<br>For ASTM D6348-03 <sup>3</sup> or Method 320, sample for a minimum of 2 hours.<br>For Method 26A, collect a minimum of 3 dscm per run.<br>For ASTM D6348-03 <sup>3</sup> or Method 320, sample for a minimum of 2 hours. |

TABLE 2 TO SUBPART UUUUU OF PART 63—EMISSION LIMITS FOR EXISTING EGUS—Continued

[As stated in § 63.9991, you must comply with the following applicable emission limits]<sup>1</sup>

| If your EGU is in this subcategory      | For the following pollutants  | You must meet the following emission limits and work practice standards  | Using these requirements, as appropriate (e.g., specified sampling volume or test run duration) and limitations with the test methods in Table 5  |
|---|---|--|---|
| 6. Solid oil-derived fuel-fired unit .. | a. Filterable particulate matter (PM).<br>OR<br>Total non-Hg HAP metals .....<br>OR<br>Individual HAP metals .....<br>Antimony (Sb) .....<br>Arsenic (As) .....<br>Beryllium (Be) .....<br>Cadmium (Cd) .....<br>Chromium (Cr) .....<br>Cobalt (Co) .....<br>Lead (Pb) .....<br>Manganese (Mn) .....<br>Nickel (Ni) .....<br>Selenium (Se) .....<br>b. Hydrogen chloride (HCl) .....<br>OR<br>Sulfur dioxide (SO <sub>2</sub> ) <sup>4</sup> .....<br>c. Mercury (Hg) ..... | 8.0E-3 lb/MMBtu or 9.0E-2 lb/MWh <sup>2</sup> .<br>OR<br>4.0E-5 lb/MMBtu or 6.0E-1 lb/GWh.<br>OR<br>.....<br>8.0E-1 lb/TBtu or 8.0E-3 lb/GWh.<br>3.0E-1 lb/TBtu or 5.0E-3 lb/GWh.<br>6.0E-2 lb/TBtu or 6.0E-4 lb/GWh.<br>3.0E-1 lb/TBtu or 4.0E-3 lb/GWh.<br>8.0E-1 lb/TBtu or 2.0E-2 lb/GWh.<br>1.1E0 lb/TBtu or 2.0E-2 lb/GWh.<br>8.0E-1 lb/TBtu or 2.0E-2 lb/GWh.<br>2.3E0 lb/TBtu or 4.0E-2 lb/GWh.<br>9.0E0 lb/TBtu or 2.0E-1 lb/GWh.<br>1.2E0 lb/TBtu 2.0E-2 lb/GWh.<br>5.0E-3 lb/MMBtu or 8.0E-2 lb/MWh.<br>OR<br>3.0E-1 lb/MMBtu or 2.0E0 lb/MWh.<br>2.0E-1 lb/TBtu or 2.0E-3 lb/GWh | Collect a minimum of 1 dscm per run.<br>Collect a minimum of 1 dscm per run.<br>Collect a minimum of 3 dscm per run.<br>For Method 26A, collect a minimum of 0.75 dscm per run; for Method 26, collect a minimum of 120 liters per run.<br>For ASTM D6348-03 <sup>3</sup> or Method 320, sample for a minimum of 1 hour.<br>SO <sub>2</sub> CEMS.<br>LEE Testing for 30 days with 10 days maximum per Method 30B run or Hg CEMS or Sorbent trap monitoring system only. |

<sup>1</sup> For LEE emissions testing for total PM, total HAP metals, individual HAP metals, HCl, and HF, the required minimum sampling volume must be increased nominally by a factor of two.

<sup>2</sup> Gross electric output.

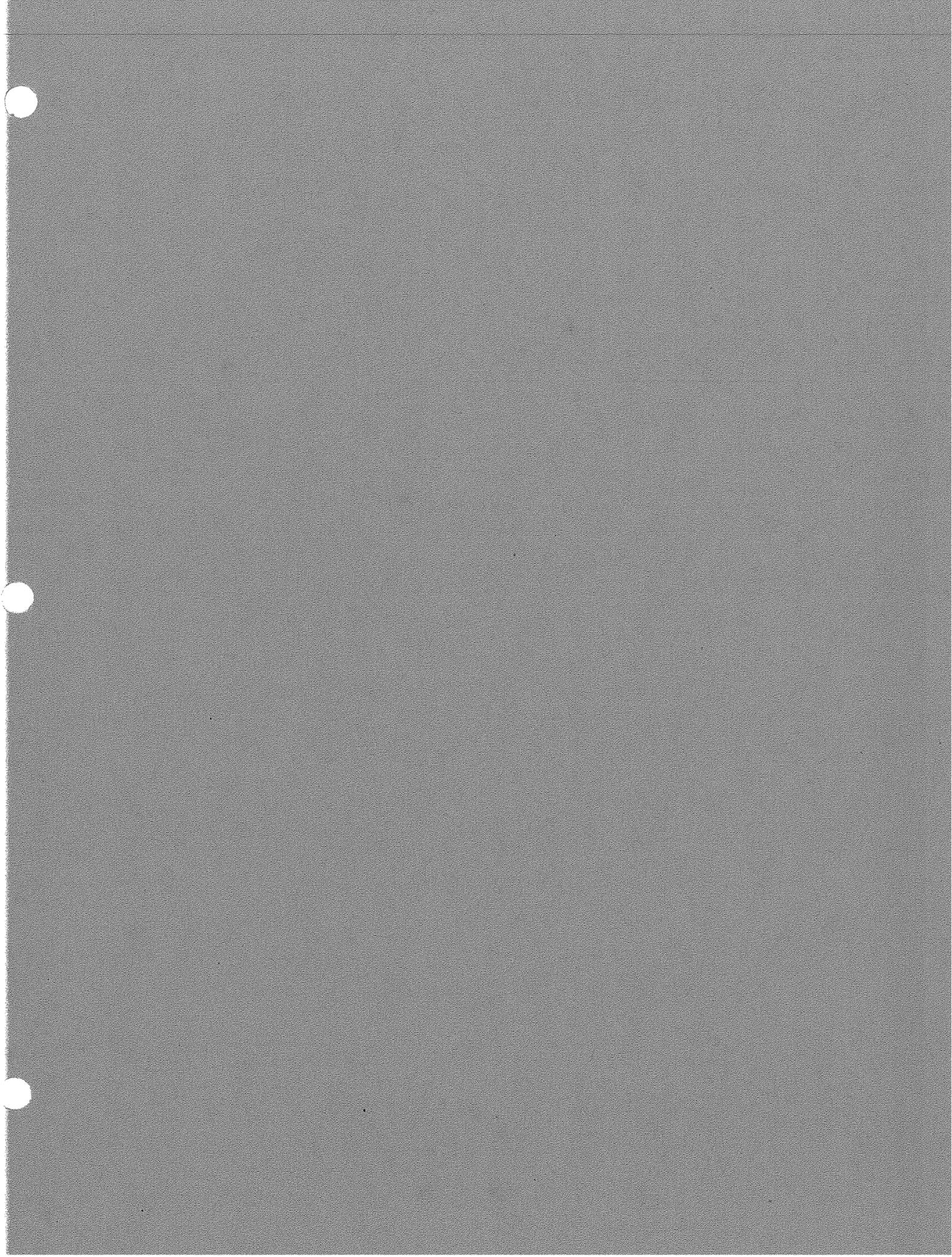
<sup>3</sup> Incorporated by reference, see § 63.14.

<sup>4</sup> You may not use the alternate SO<sub>2</sub> limit if your EGU does not have some form of FGD system and SO<sub>2</sub> CEMS installed.

TABLE 3 TO SUBPART UUUUU OF PART 63—WORK PRACTICE STANDARDS

[As stated in §§ 63.9991, you must comply with the following applicable work practice standards]

| If your EGU is . . .   | You must meet the following . . .  |
|--|--|
| 1. An existing EGU .....   | Conduct a tune-up of the EGU burner and combustion controls at least each 36 calendar months, or each 48 calendar months if neural network combustion optimization software is employed, as specified in § 63.10021(e).  |
| 2. A new or reconstructed EGU .....  | Conduct a tune-up of the EGU burner and combustion controls at least each 36 calendar months, or each 48 calendar months if neural network combustion optimization software is employed, as specified in § 63.10021(e).  |
| 3. A coal-fired, liquid oil-fired, or solid oil-derived fuel-fired EGU during startup. | You must operate all CMS during startup. Startup means either the first-ever firing of fuel in a boiler for the purpose of producing electricity, or the firing of fuel in a boiler after a shutdown event for any purpose. Startup ends when any of the steam from the boiler is used to generate electricity for sale over the grid or for any other purpose (including on site use). For startup of a unit, you must use clean fuels, either natural gas or distillate oil or a combination of clean fuels for ignition. Once you convert to firing coal, residual oil, or solid oil-derived fuel, you must engage all of the applicable control technologies except dry scrubber and SCR. You must start your dry scrubber and SCR systems, if present, appropriately to comply with relevant standards applicable during normal operation. You must comply with all applicable emissions limits at all times except for periods that meet the definitions of startup and shutdown in this subpart. You must keep records during periods of startup. You must provide reports concerning activities and periods of startup, as specified in § 63.10011(g) and § 63.10021(h) and (i). |







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JOHN A. SANCHEZ  
Lieutenant Governor

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1190 Saint Francis Drive, PO Box 5469  
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Telephone (505) 827-2855 Fax (505) 827-2836  
www.nmenv.state.nm.us



DAVE MARTIN  
Secretary  
BUTCH TONGATE  
Deputy Secretary

February 10, 2012

Dr. Al Armendariz  
Regional Administrator (6-A)  
U.S. Environmental Protection Agency, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Dear Dr. Armendariz:

It has come to my attention that the portions of the November 2, 2006 and May 2, 2007 New Mexico submittals under the Clean Air Act, specifically, as they relate to the New Mexico State Implementation Plan (SIP), were submitted in error. Accordingly, I wish to correct the record with this letter.

I am withdrawing from your consideration as a SIP submittal the following portions of the November 2, 2006 and May 2, 2007 submittals:

- 20.2.70 NMAC Operating Permits submitted November 2, 2006 (Pt 70 (OPP))
- 20.2.84 NMAC Acid Rain Permits submitted May 2, 2007 (NM St Pt 84 Acid Rain)

As is further explained in the enclosure to this letter, these sections remain before you for consideration as updates to the New Mexico Title V program. Further, I understand that our withdrawal of these two sections will be taken into account under the settlements with WildEarth Guardians, Civil Action No. 09-cv-02148. To assist in this effort, I have parenthetically noted the descriptor of each submittal as referenced in the settlements.

Thank you for your consideration of this clarification. If there are any questions, please contact Rita Bates at (505) 476-4304.

Sincerely,

Dave Martin  
Secretary

Enclosure

cc: Jeff Robinson, EPA Region 6

Dr. Al Armendariz  
 February 10, 2012  
Enclosure

Both the November 2, 2006 and May 2, 2007 submittals included adoption of or revisions to one or more regulations that:

- (1) are part of the SIP (under Title I of the Clean Air Act),
- (2) are part of the New Mexico operating permit program under Title V of the Clean Air Act, or allow delegation of the implementation of federal emissions standards to the state.

Although these categories of regulations are distinct and do not overlap, interactions between them are common. The specific program status of each submitted regulation is:

| <b>Submittal Date</b> | <b>Regulation</b>  | <b>Program Status</b>             |
|-----------------------|--|-----------------------------------|
| November 2, 2006      | 20.2.3 NMAC - Ambient Air Quality Standards  | SIP                               |
|                       | 20.2.70 NMAC - Operating Permits   | Title V                           |
|                       | 20.2.72 NMAC - Construction Permits  | SIP                               |
|                       | 20.2.99 NMAC - [Transportation Conformity]   | SIP                               |
| May 2, 2007           | 20.2. 71 NMAC - Operating Permit Emissions Fees  | Title V                           |
|                       | 20.2.77 NMAC - New Source Performance Standards  | Delegation of Emissions Standards |
|                       | 20.2.84 NMAC - Acid Rain Permits   | Title V                           |
|                       | 20.2.85 NMAC - Mercury Emission Standards and Compliance Schedules for Electric Generating Units | SIP                               |

The November 2, 2006 submittal was in effect both a revision of the SIP and a revision of the Title V program and amended 20.2.3, 20.2.70, 20.2.72, and 20.2.99 NMAC. To the extent that this dual-revision aspect of the submittal was not adequately described in the submittal letter, I would like to clarify that only the amendments to 20.2.3, 20.2.72 and 20.2.99 NMAC were intended to be considered as a SIP revision, and the amendments to 20.2.70 NMAC are intended to be considered as a Title V program revision. Submitting the same package as both a SIP and Title V revision made sense from the basis that the respective rule changes provide context for one another and were made in the same hearing. However, efficiency can also create confusion. Therefore, we are withdrawing 20.2.70 NMAC Operating Permits (Pt 70 OPP) from further SIP consideration. The submittal of 20.2.70 NMAC remains before you for consideration as a Title V program update.

With regards to the May 2, 2007 submittal, which amended 20.2.71, 20.2.77 and 20.2.84 NMAC, and adopted 20.2.85 NMAC, I withdraw this as a SIP submittal entirely. We are currently planning to rescind 20.2.85 NMAC, which is the only SIP rule in that submittal. Although the cover letter referred to amendments to 20.2.84 NMAC – Acid Rain Permits as addressing the Clean Air Mercury Rule, the amendments are best described as addressing federal revisions to the Acid Rain program. The May 2, 2007, submittal of 20.2.84 NMAC (NM St Pt 84 Acid Rain) remains before you for consideration as a Title V program update.

With regards to all aspects of each of these packages that were and continue to be submitted as revisions to the Title V program, the submittals are consistent with and meet the public participation and all other applicable requirements of our approved Title V program and with the original Attorney General's submittal for that program.





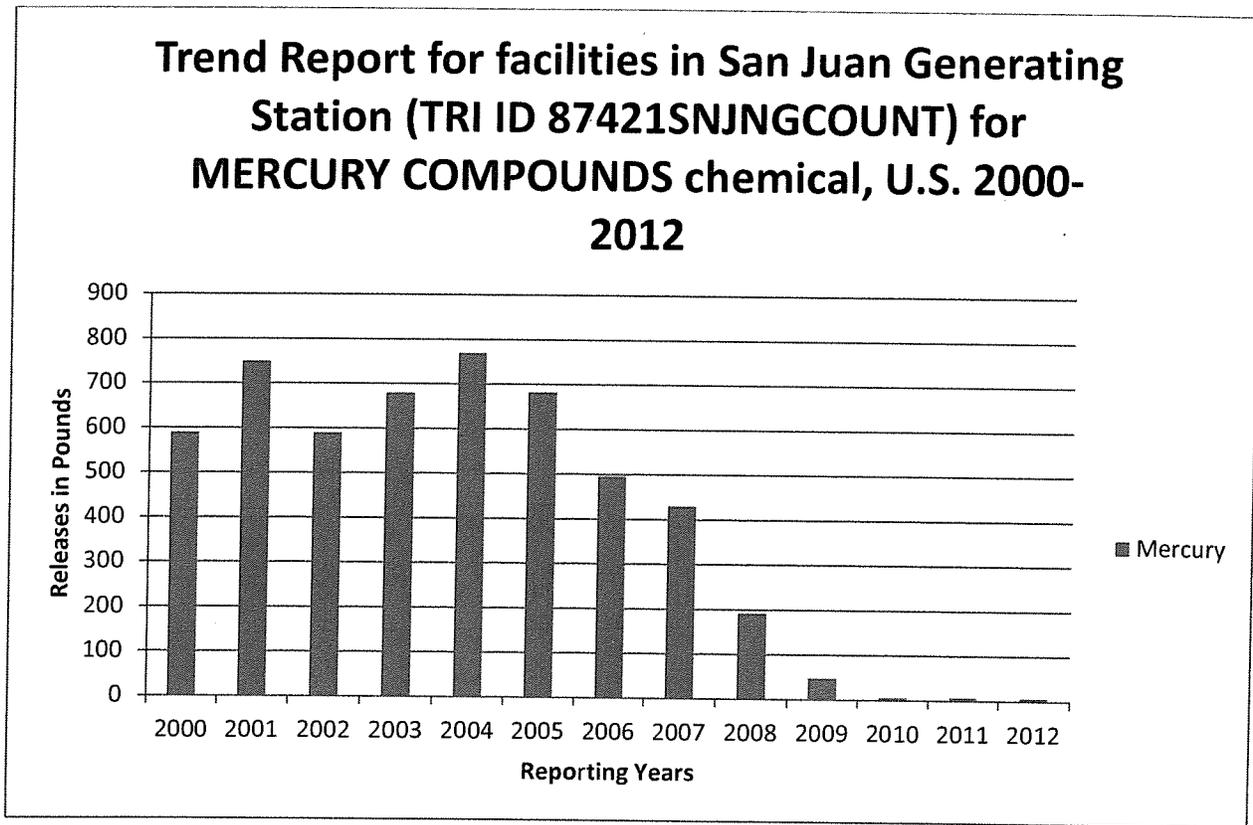
# New Mexico Mercury Emissions

**Table-I Comparison of MATS Part 85 and Current Mercury Emissions**

| Facility  | MATS*                     | Part 85 2010-2017      | Part 85 2018             | Current Hg Emissions TRI Data(2012) |
|-----------|---------------------------|------------------------|--------------------------|-------------------------------------|
| San Juan  | 0.102 tn/yr (204.9lbs/yr) | 0.244tn/yr (488lbs/yr) | 0.103tn/yr(207.7lbs/yr)  | 0.004 tn/yr (7.1lbs/yr)             |
| Escalante | 0.014tn/yr (28.5lbs/yr)   | 0.04 tn/yr (80lbs/yr)  | 0.011tn/yr (21.25lbs/yr) | 0.006tn/yr (12.3lbs)                |

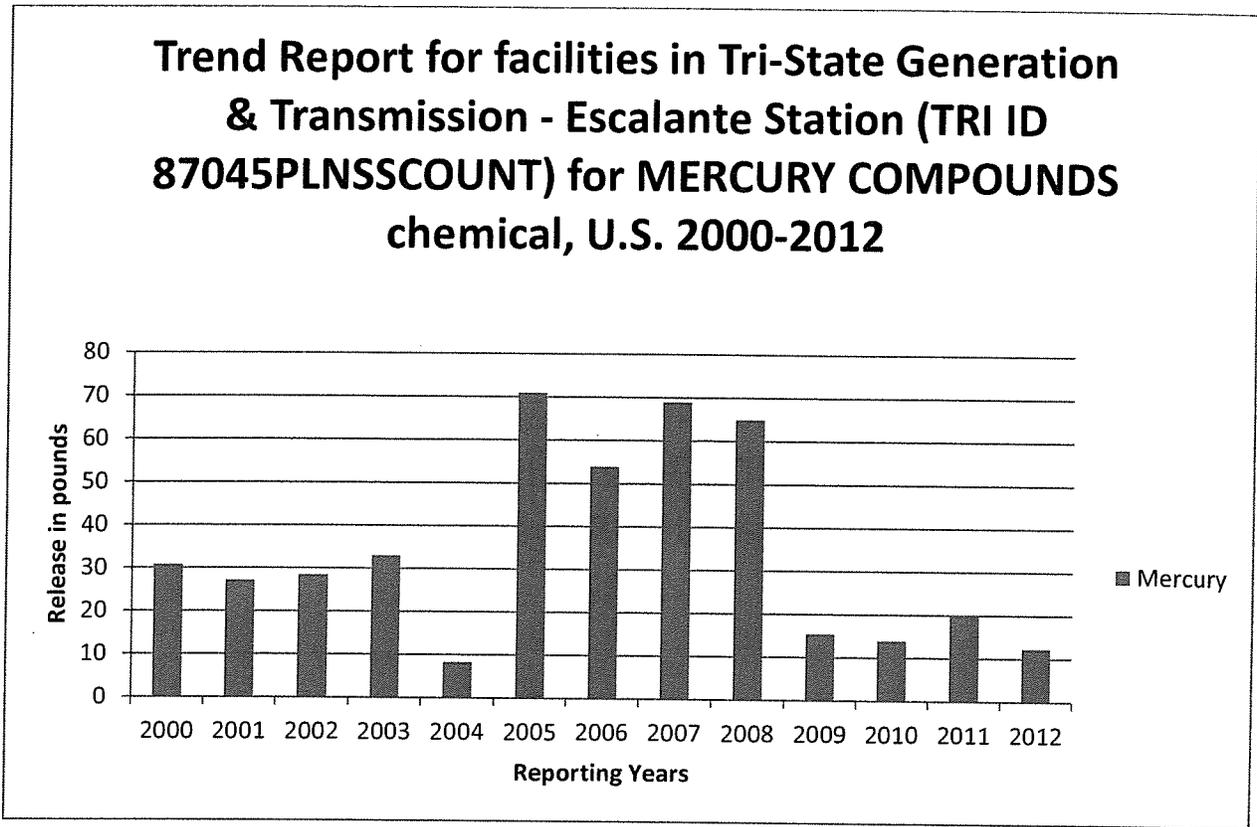
\* 40 CFR Part 63, Subpart UUUUU Table 2-EMISSION LIMITS FOR EXISTING EGUS

**Figure-I Mercury Emission Reduction Trends for San Juan Generating Station 2000 Through 2012**



| Reporting years | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009  | 2010 | 2011 | 2012 |
|-----------------|------|------|------|------|------|------|------|------|------|-------|------|------|------|
| Hg (Pounds)     | 590  | 750  | 590  | 680  | 770  | 683  | 496  | 430  | 192  | 47.79 | 6.39 | 7.3  | 7.1  |

**Figure-II Mercury Emission Reduction Trends for Tri-State Generating Station 2000 Through 2012**



| Reporting Years | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|-----------------|------|------|------|------|------|------|------|------|------|------|------|------|------|
| Hg(pounds)      | 30.8 | 27.2 | 28.5 | 33   | 8.3  | 71   | 54   | 69   | 65   | 15.5 | 14   | 19.8 | 12.3 |







New Mexico Commission of Public Records  
Administrative Law Division

1205 Camino Carlos Rey  
Santa Fe, NM 87507  
505-476-7907

**Affidavit of Publication in the *New Mexico Register***

I, John Martinez, certify that the agency noted below has published legal notices or rules in the New Mexico Register, and that payment has been assessed by invoice for said legal notice or publication, which appeared on the date and in the volume and issue number noted below.

Date of Publication: 12/30/2013

Volume: XXIV Issue #: 24

Invoice #: NMR-2014- 121

Amount: \$46.00

Agency:

EIB - Air Quality

Contact: Robert Spillers

525 Camino de los Marquez

Santa Fe, NM 87505-

Description:

Notice

Notice of Rulemaking Hearing

RECEIVED

JAN 13 2014

Air Quality Bureau

State of New Mexico, County of Santa Fe

Signed and affirmed before me on Monday, January 06, 2014

by John Martinez

Notary Public:

*Louise Wood*

Louise Wood

[My commission expires: 5 15 17]

Affiant:

*John Hyrum Martinez*

Publisher, *New Mexico Register*

Date: 1/6/2014

*-Copies of the published material documented in this affidavit are enclosed-*

(seal)

Form SRC-2002-04 Revised July 2007

introduce exhibits and to examine witnesses in accordance with the Joint Air Quality Control Board Ordinances, Section 9-5-1-6 ROA 199-1 and Bernalillo County Ordinance 94-5, Section 6, and 20.11.82 NMAC, *Rulemaking Procedures -- Air Quality Control Board*.

Anyone intending to present technical testimony at this hearing is required by 20.11.82.20 NMAC, *Technical Testimony: Notice Of Intent (NOI)*, to submit a written Notice Of Intent to testify (NOI) before 5:00pm on January 28, 2014, to: Attn: Neal Butt, Air Quality Division, Albuquerque Environmental Health Department, P.O. Box 1293, Albuquerque, NM 87103, or, you may deliver your NOI to the Environmental Health Department, Suite 3023, Albuquerque-Bernalillo County Government Center, One Civic Plaza NW, Albuquerque, NM, 87102. The NOI shall: 1. identify the person for whom the witness or witnesses 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. summarize or include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness; 4. include the text of any recommended modifications to the proposed regulatory change; and 5. list and describe, or attach, all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules.

In addition, written comments to be incorporated into the public record for this hearing should be received at the above P.O. Box, or Environmental Health Department office, before 5:00 pm on February 5, 2014. Comments shall include the name and address of the individual or organization submitting the statement. Written comments may also be submitted electronically to [nbutt@cabq.gov](mailto:nbutt@cabq.gov) and shall include the required name and address information. Interested persons may obtain a copy of the proposed regulation at the Environmental Health Department Office, or by contacting Mr. Neal Butt electronically at [nbutt@cabq.gov](mailto:nbutt@cabq.gov) or by phone (505) 768-2660.

**NOTICE FOR PERSON WITH DISABILITIES:** If you have a disability and require special assistance to participate in this process, please call 311 (Voice) and special assistance will be made available to you to receive any public meeting documents, including agendas and minutes. TTY users may request special assistance by calling the New Mexico Relay at 1-800-659-8331.

## NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

### NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF RULEMAKING HEARING

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing on March 21, 2014 at 10:00 AM in Room 307 at the State Capitol located at 490 Old Santa Fe Trail in Santa Fe, New Mexico. The purpose of the hearing is to consider the matter of EIB 13-09 (R), proposed repeal of Air Quality Control Regulation 20.2.85 NMAC Mercury Emission Standards and Compliance Schedules for Electric Generating Units ("20.2.85 NMAC").

The proponent of this regulatory repeal is the New Mexico Environment Department ("NMED") Air Quality Bureau.

The purpose of the public hearing is to consider and take possible action on a petition from NMED Air Quality Bureau to repeal 20.2.85 NMAC Mercury Emission Standards and Compliance Schedules for Electric Generating Units. This regulation was first adopted in 2007 to comply with a new federal regulation known as the Clean Air Mercury Rule, or CAMR. The proposed repeal of 20.2.85 NMAC is based on the vacatur of the Clean Air Mercury Rule, leaving 20.2.85 NMAC without any federal enforceability, and the implementation of the new Mercury Air Toxics Rule (MATS). The proposed repeal will eliminate any excess or redundant regulatory burdens placed on the State and facilities located within the jurisdiction of the New Mexico Environment Department relevant to 20.2.85 NMAC and the Mercury Air Toxics Rule, and any issues associated with enforcement of 20.2.85 NMAC.

The NMED will host an informal open house on the proposed repeal of 20.2.85 NMAC at the NMED Air Quality Bureau Office at 525 Camino de los Marquez, Suite 1, Santa Fe, New Mexico from 12:00pm to 2:00pm on February 3, 2014. To attend the informational open house, please contact Robert Spillers at 505-476-4324 or [robert.spillers@state.nm.us](mailto:robert.spillers@state.nm.us).

The full text of the regulation proposed to be repealed may be reviewed during regular business hours at the NMED Air Quality Bureau office, 525 Camino de los Marquez, Suite 1, Santa Fe, New Mexico, and is also available on NMED's web site at [www.nmenv.state.nm.us](http://www.nmenv.state.nm.us), or by contacting Robert Spillers at (505) 476-4324 or [robert.spillers@state.nm.us](mailto:robert.spillers@state.nm.us).

[spillers@state.nm.us](mailto:spillers@state.nm.us).

The hearing will be conducted in accordance with 20.1.1 NMAC (Rulemaking Procedures – Environmental Improvement Board), the Environmental Improvement Act, NMSA 1978, Section 7-1-1-9, the Air Quality Control Act Section, NMSA 1978, 74-2-6, and other applicable procedures.

All interested persons will be given reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Persons wishing to present technical testimony must file with the Board a written notice of intent to do so. The notice of intent shall:

- (1) identify the person for whom the witness(es) will testify;
- (2) identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
- (3) summarize or include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness;
- (4) list and describe, or attach, each exhibit anticipated to be offered by that person at the hearing; and
- (5) attach the text of any recommended modifications to the proposed new and revised regulations.

Notices of intent for the hearing must be received in the Office of the Board not later than 5:00 pm on February 28, 2014 and should reference the docket number, EIB 13-09 (R), and the date of the hearing. Notices of intent to present technical testimony should be submitted to:

Pam Castaneda, Board Administrator  
Office of the Environmental Improvement Board  
Harold Runnels Building  
1190 St. Francis Dr., Room 2150-N  
Santa Fe, NM 87502  
Phone: (505) 827-2425, Fax (505) 827-0310

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 exhibits in connection with his 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 having a disability and needing help in being a part of this hearing process should contact the Juan Carlos Borrego of the NMED Human Resources Bureau by March 7, 2014 at P.O. Box 26110, 1190 St. Francis Drive, Santa Fe, New Mexico, 87502, telephone 505-827-0121, or email [juancarlos.borrego@state.nm.us](mailto:juancarlos.borrego@state.nm.us). TDY users please access his number via the New Mexico Relay Network at 1-800-659-8331.

The Board may make a decision on the proposed revised regulations at the conclusion of the hearing, or the Board may convene a meeting at a later date to consider action on the proposal.

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## NEW MEXICO GAME COMMISSION

### STATE GAME COMMISSION PUBLIC MEETING AND RULE MAKING NOTICE

On Thursday, January 9, 2014, beginning at 8:00 a.m., in the UNM-Valencia, Learning Resource Center, Room 101, 280 La Entrada, Los Lunas, NM 87031, the State Game Commission will meet in public session to hear and consider action as appropriate on the following: Election of Chair and Vice Chair of State Game Commission, Annual Renewal of Open Meeting Procedures, Revocations, Citizen Advisory Committee Appointments for Habitat Stamp Program, Initiation of Javelina Rule Development 19.31.21 NMAC for the 2015-2019 Seasons, Initiation of Barbary Sheep, Oryx and Persian Ibex Rule Development – 19.31.12 NMAC for the 2015-2019 Seasons, Director's Initiation of Biennial Review of State Listed and Threatened or Endangered Species (17-2-40 NMSA 1978), and New Mexico Crucial Habitat Assessment Tool. Additionally they will hear and consider action as appropriate on proposed and final amendments to the following rules: Final Proposed Amendments to portions of 19.31.3 NMAC for Donation of Licenses and Permits, Final Proposed Amendments to portions of 19.31.12 NMAC for Oryx Licenses Issues to Service Men and Women, and Final Proposed Amendments to portions of 19.35.7 and 19.35.9 NMAC for Chronic Wasting Disease Testing Requirements for Importation and Herd Certification Program. They will hear general public comments (comments are limited to three minutes). A closed executive session is planned to discuss matters related to litigation.

Obtain a copy of the agenda from the Office of the Director, New Mexico Department of Game and Fish, P.O. Box 25112, Santa Fe, New Mexico 87504, or from

the Department's website. This agenda is subject to change up to 72 hours prior to the meeting. Please contact the Director's Office at (505) 476-8000, or the Department's website at [www.wildlife.state.nm.us](http://www.wildlife.state.nm.us) for updated information.

If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing or meeting, please contact the Department at (505) 476-8000 at least one week prior to the meeting or as soon as possible. Public documents, including the agenda and minutes, can be provided in various accessible formats. Please contact the Department at 505-476-8000 if a summary or other type of accessible format is needed.

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## NEW MEXICO DEPARTMENT OF PUBLIC SAFETY MOTOR TRANSPORTATION DIVISION

### Notice NEW MEXICO DEPARTMENT OF PUBLIC SAFETY MOTOR TRANSPORTATION PUBLIC HEARING

On Monday February 3, 2014 at 9:00 a.m., the Motor Transportation Division will hold Public Hearing on rule change 18.19.8.102 Police Escorts.

The Public Hearing will be held at the New Mexico Law Enforcement Academy, 4491 Cerrillos Rd. Santa Fe, NM 87507

For copies of the proposed rule change may be obtained by accessing our website at [www.dps.nm.org](http://www.dps.nm.org) or by calling Captain Chris Mayrant at (505) 476-2467.

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**End of Notices and Proposed  
Rules Section**

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\* UNAPPLIED AMOUNTS ARE INCLUDED IN TOTAL AMOUNT DUE



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FEB 11 2014

STATE OF NEW MEXICO  
County of Bernalillo SS

Air Quality Bureau

Linda MacEachen, being duly sworn, declares and says that she is Classified Advertising Manager of The Albuquerque Journal, and 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 that payment therefore has been made of assessed as court cost; that the notice, copy of which is hereto attached, was published in said paper in the regular daily edition, for 1 times, the first publication being on the 12<sup>th</sup> day of January, 2014, and the subsequent consecutive publications on \_\_\_\_\_, 20\_\_\_\_.

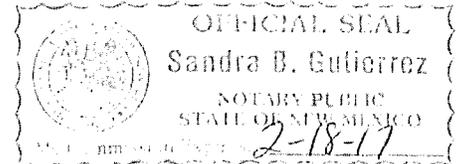
Linda MacEachen

Sworn and subscribed before me, a Notary Public, in and for the County of Bernalillo and State of New Mexico this 13<sup>th</sup> day of January of 2014.

PRICE <sup>13</sup> 271.66

Statement to come at end of month.

ACCOUNT NUMBER 1007594



Sandra B. Gutierrez



NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF RULEMAKING HEARING

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The NMED will host an informal open house on the proposed repeal of 20.2.85 NMAC at the NMED Air Quality Bureau Office at 525 Camino de los Marquez, Suite 1, Santa Fe, New Mexico from 12:00pm to 2:00pm on February 3, 2014. To attend the informational open house, please contact Robert Spillers at 505-476-4324 or robert.spillers@state.nm.us.

The full text of the regulation proposed to be repealed may be reviewed during regular business hours at the NMED Air Quality Bureau office, 525 Camino de los Marquez, Suite 1, Santa Fe, New Mexico, and is also available on NMED's web site at www.nmenv.state.nm.us, or by contacting Robert Spillers at (505) 476-4324 or robert.spillers@state.nm.us.

The hearing will be conducted in accordance with 20.1.1 NMAC (Rulemaking Procedures - Environmental Improvement Board), the Environmental Improvement Act, NMSA 1978, Section 74-1-9, the Air Quality Control Act Section, NMSA 1978, 74-2-6, and other applicable procedures.

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- (1) identify the person for whom the witness(es) will testify;
(2) identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
(3) summarize or include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness;
(4) list and describe, or attach, each exhibit anticipated to be offered by that person at the hearing; and
(5) attach the text of any recommended modifications to the proposed new and revised regulations.

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Pam Castañeda, Board Administrator
Office of the Environmental Improvement Board
Harold Runnels Building
1190 St. Francis Dr., Room 2100-S
Santa Fe, NM 87502
Phone: (505) 827-2425, Fax (505) 827-0310

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 exhibits in connection with his 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 having a disability and needing help in being a part of this hearing process should contact the Juan Carlos Borrego of the NMED Human Resources Bureau by March 7, 2014 at P.O. Box 26110, 1190 St. Francis Drive, Santa Fe, New Mexico, 87502, telephone 505-827-0424, or email juan.carlos.borrego@state.nm.us. TDY users please access his number via the New Mexico Relay Network at 1-800-659-8331.

The Board may make a decision on the proposed revised regulations at the conclusion of the hearing, or the Board may convene a meeting at a later date to consider action on the proposal.

DIRECCIÓN DE MEJORAS MEDIOAMBIENTALES DE NUEVO MÉXICO AVISO DE AUDIENCIA DE REGLAMENTACIÓN

La Junta de Mejoramiento Ambiental de Nuevo México ("Junta") celebrará una audiencia pública el 21 de marzo de 2014 a las 10:00 AM en la Sala 307 en el Capitolio Estatal ubicada a 490 Old Santa Fe Trail en Santa Fe, Nuevo México. El propósito de la audiencia es considerar el asunto de EIB 13-09 (R), se propone la derogación de la Calidad del Aire Reglamento 20.2.85 Control de NMAC Normas de emisiones de mercurio y programas de cumplimiento para Electric Unidades Generadoras ("20.2.85 NMAC").

El Departamento del Medio Ambiente de Nuevo México ("NMED", por sus siglas en inglés) es el que propone estas enmiendas normalvas.

El propósito de la audiencia pública es considerar y tomar acción posible sobre una petición de NMED Oficina de Calidad del Aire para derogar 20.2.85 NMAC Normas de emisiones de mercurio y los programas de cumplimiento de las Unidades Generadoras de Electricidad. Este Reglamento fue adoptado por primera vez en 2007 para cumplir con una nueva regulación federal conocida como el Mercury Regla de Aire Limpio o CAMR. La propuesta de derogación de 20.2.85 NMAC se basa en la vacatur del Mercury Regla de Aire Limpio, dejando 20.2.85 NMAC sin exigibilidad federal, y la aplicación de la nueva Regla Mercury Tóxicos en el Aire (MATS). La derogación propuesta eliminará cualquier cargas regulatorias excesivas o redundantes ubicados en el Estado y de instalaciones ubicadas dentro de la jurisdicción del Departamento de Medio Ambiente de Nuevo México correspondiente a 20.2.85 NMAC y Tóxicos en el Aire Regla Mercury, y cualquier cuestión relacionada con la aplicación del 20.2.85 NMAC.

El NMED acogerá una casa informal abierto sobre la propuesta de derogación de 20.2.85 NMAC a la Oficina de Oficina de Calidad del Aire de NMED a 525 Camino de los Marquez, Suite 1, Santa Fe, Nuevo México 12:00pm-2:00pm el 3 de febrero, 2014. Para asistir a la jornada de puertas abiertas de información, póngase en contacto con Robert Spillers al 505-476-4324 robert.spillers@state.nm.us.

El texto de la norma propuesta para derogación se puede revisar en horas hábiles, en el Air Quality Bureau del NMED, 525 Camino de los Marquez, Suite 1, Santa Fe, Nuevo México, en el sitio electrónico del NMED: www.nmenv.state.nm.us, o comunicándose con Robert Spillers en el (505) 476-4324 o por correo electrónico: robert.spillers@state.nm.us.

La audiencia se llevará a cabo de acuerdo con la 20.1.1 NMAC (Procedimientos de Reglamentación - Dirección de Mejoras Medioambientales), la Ley de Mejoras Medioambientales, NMSA 1978, 574-1-9, la Ley de Control de la Calidad del Aire, NMSA 1978, 574-2-6, y cualquier orden de procedimiento pertinente.

A todas las personas interesadas se les dará una oportunidad razonable en la audiencia para presentar pruebas pertinentes, información, puntos de vista y argumentos, en forma oral o escrita, para someter pruebas e interrogar a testigos. Las personas que deseen dar testimonio técnico deben presentar un aviso por escrito a la Dirección indicando su intención de hacerlo. El aviso de intención debe:

- (1) identificar a la persona por quien el testigo (los testigos) darán(n) testimonio.
(2) identificar a cada testigo técnico que la persona presentará e indicar la capacidad del testigo o incluir una descripción de su educación y antecedentes profesionales;
(3) incluir una copia de las declaraciones directas en forma de narración de cada testigo técnico;
(4) dar una lista de las pruebas que la persona vaya a presentar en la audiencia y adjuntar cada una de las pruebas; y
(5) adjuntar el texto de cualquier modificación recomendada para el cambio normativo propuesto.

Los avisos de intención para la audiencia deben recibirse en la oficina de la Dirección a más tardar el 28 de febrero 2014 a las 5:00 p. m. y deben hacer referencia al número del caso, EIB 13-09 (R), y la fecha de la audiencia. Los avisos de intención de presentar testimonios técnicos (deben presentarse a:

Pam Castañeda, Board Administrator
Office of the Environmental Improvement Board
Harold Runnels Building
1190 St. Francis Dr., Room 2100-S
Santa Fe, NM 87502
Tel: (505) 827-2425, Fax (505) 827-2836

Cualquier miembro del público en general puede dar declaraciones en la audiencia. No es necesario avisar previamente para dar declaraciones que no sean técnicas en la audiencia. También, cualquier persona puede ofrecer pruebas con relación a su testimonio, siempre y cuando dichas pruebas no sean exageradamente repetitivas del testimonio.

Un miembro del público en general que en lugar de hacer declaraciones orales en la audiencia desee presentar una declaración por escrito para que conste en el acta, deberá registrar la declaración por escrito antes de la audiencia o la puede entregar

en la audiencia.

Las personas con discapacidades y que necesiten ayuda para participar en esta audiencia deben comunicarse con J. C. Borrego, del NMED Human Resources Bureau a más tardar el 7 de marzo 2014, por correo: P.O. Box 5469, 1190 St. Francis Drive, Santa Fe, Nuevo México, 87502-5469; o teléfono: 505-827-0424. Los usuarios de TDY pueden acceder a su número por el New Mexico Relay Network en el 1-800-659-8331.

La Dirección puede tomar una decisión sobre las propuestas normas modificadas al concluir la audiencia, o puede convocar a una reunión en una fecha posterior para considerar la acción sobre la propuesta.





## **Ned Jerabek: Management and Professional Experience**

### MANAGEMENT EXPERIENCE

#### NMED Air Quality Bureau

Permitting Major Source Section Manager 10/10 to Present (3.4 years)

Title V Permitting Manager 10/97 to 10/10 (13 years)

#### Phelps Dodge Corporation

Control Room Supervisor & Air Quality Advisor 2/87 to 2/90 (3 years)

#### Cochise College

Aviation Meteorology Staff Instructor 4/86 to 2/87 (10 months)

#### National Oceanic & Atmospheric Administration NOAA

Meteorological Science Officer 7/79 to 9/80 (1 year 2 months)

#### Northern Arizona University

Supervisor NAU Weather Lab 8/78 to 12/78 (4 months)

Total Management Experience 21 years 4 months

### PROFESSIONAL EXPERIENCE

#### NMED Air Quality Bureau

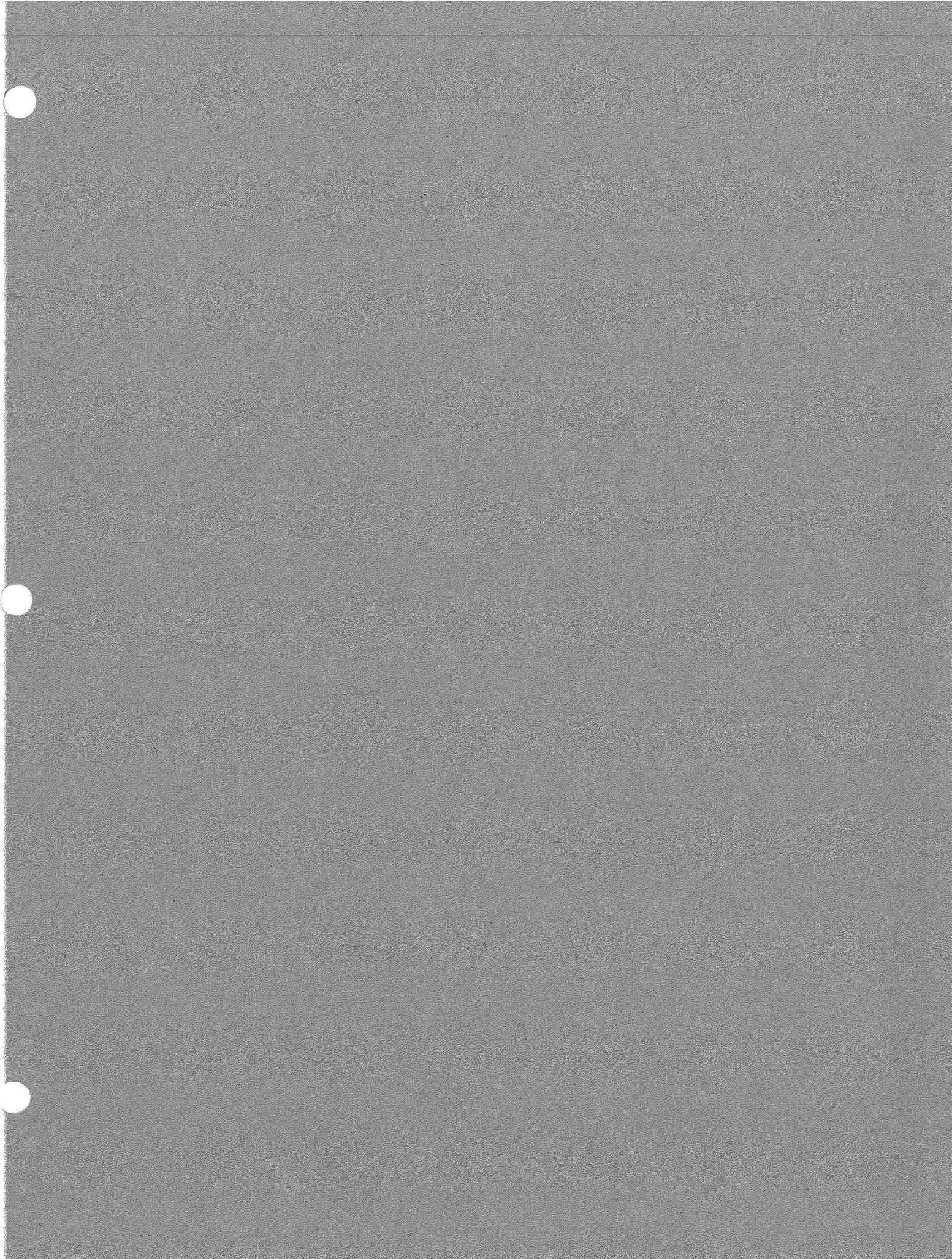
Environmental Specialist, New Source Review 6/92 to 9/97 (5 years 3 months)

#### Phelps Dodge Corporation

Air Quality Meteorologist 11/80 to 2/87 (6 years 3 months)

Total Professional Experience 32 years 10 months







**STATE OF NEW MEXICO  
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD**

**IN THE MATTER OF PROPOSED REPEAL  
OF 20.2.85 NMAC, MERCURY EMISSION STANDARDS  
AND COMPLIANCE SCHEDULES FOR  
ELECTRIC GENERATING UNITS**

**No. EIB 13-09 (R)**

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**ORDER AND STATEMENT OF REASONS  
FOR REGULATORY CHANGES**

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This matter comes before the New Mexico Environmental Improvement Board (“Board”) upon a petition filed by the New Mexico Environment Department (“NMED” or “Department”), proposing repeal of 20.2.85 NMAC. The Board heard testimony from the Department and admitted exhibits into the record. On March 21, 2014, the Board deliberated and voted to adopt the proposed repeal for the reasons that follow:

**STATEMENT OF REASONS**

1. On April 4, 2007, the Board adopted proposed 20.2.85 NMAC, *Mercury Emission Standards and Compliance Schedules for Electric Generating Units* (“Part 85”). See NMED Exhibit 5, Order and Statement of Reasons in EIB No. 06-15 (R), at p. 9.
2. Part 85 was proposed by the Department in response to requirements imposed by the U.S. Environmental Protection Agency’s (“EPA”) Clean Air Mercury Rule (“CAMR”), which, among other things, established a mercury emission budget for each state. *Id.* at ¶ 14. Part 85 reflected the Department’s decision to opt out of the optional CAMR trading program. *Id.* at ¶ 15. Instead, Part 85 provides for mercury emission limits for two

affected electric generating units in the State and provides a set-aside for new units. See 20.2.85101.B (1) – (2) NMAC.

3. On February 8, 2008, the U.S. Court of Appeals for the District of Columbia Circuit vacated CAMR. The court held that the EPA was required to follow the prescribed statutory procedure for removing mercury emissions from electric generating units (“EGUs”) from regulation under Clean Air Act (“CAA”) Section 112. Because CAMR was promulgated under the authority of CAA Section 111, which cannot be used to regulate sources subject to regulation under Section 112, EPA's failure to follow the proper delisting procedure under Section 112 rendered the CAMR provisions unlawful. See NMED Ex. 6, *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008), see also Exhibit 4, Testimony of Robert Spillers, at pp. 3-4.
4. Subsequent to the vacatur of CAMR, EPA promulgated the Mercury and Air Toxics Standards (“MATS”) under CAA Section 112. The MATS prescribes specific emission limits for various subcategories, on a mass emitted per energy input basis, for mercury and other toxic air pollutants. See NMED Exhibit 7, Excerpt from MATs at 77 Fed. Reg. 9466 – 9493, see also NMED Exhibit 4 at p. 4.
5. In considering the proposed regulatory changes, the Board is required by the Air Quality Control Act, NMSA 1978, § 74-2-5.E to give the weight it deems appropriate to all facts and circumstances, including but not limited to (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.

6. Mercury emissions are injurious to public health and welfare. See NMED Exhibit 4, Testimony of Robert Spillers, at pp. 1-2.
7. The federal MACT standards, including the MATS, are established by the EPA for categories and subcategories of sources of emissions of hazardous air pollutants, based on the maximum degree of reduction of emissions achievable, taking into consideration the cost of achieving the reductions, any nonair quality health and environmental impacts and energy requirements. 42 U.S.C. § 7412(d)(2).
8. EPA's determination of the MATS therefore considers the character and degree of injury to or interference with health, and welfare; the public interest, including the social and economic value of the sources and subjects of air contaminants; and the technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved.
9. The MATS rule was among the revisions to federal Maximum Achievable Control Standards (MACT) incorporated by reference when revisions to 20.2.77 NMAC and 20.2.82 NMAC were adopted by the Board in November, 2013. See 20.2.77.9 and 20.2.82.8 NMAC; see also NMED Exhibit 4 at p. 4.
10. The MATS are enforceable in New Mexico as a matter of federal law regardless of whether New Mexico has adopted them into state regulations. See CAA 112(l)(7) (providing that "Nothing in this subsection [state programs] shall prohibit the [EPA] Administrator from enforcing any applicable emission standard or requirement under this section.") .

11. The Air Quality Control Act requires the Board to adopt regulations requiring new coal fired EGUs to achieve 90% control of mercury emissions, relative to the mercury content of the coal, or best achievable control technology, whichever is greater. See NMSA 1978, § 74-2-5 (C)(4).
12. 20.2.86 NMAC - Best Available Control Technology for Mercury at New Power Plants, which was adopted by the Board in 2008, codifies the requirements of NMSA 1978, § 74-2-5 (C)(4). See NMED Exhibit 4 at p. 5.
13. Mercury emissions from coal- and oil-fired EGUS are therefore currently subject to regulation under both 20.2.86 NMAC and the MATS as incorporated in 20.2.77 and 20.2.82 NMAC. These existing regulations address consideration number (1) of NMSA 1978, § 74-2-5.E (the character and degree of injury to or interference with health and welfare), and consideration number (3) (the technical practicability and economic reasonableness of reducing or eliminating air contaminants).
14. Mercury emissions from the two existing New Mexico facilities subject to Part 85 are currently lower than required by either Part 85 or the MATS. See NMED Exhibit 9, Table 1.
15. The repeal of 20.2.85 NMAC is in the public interest because it will increase regulatory certainty and clarity for the affected sources and the public and eliminate regulations that are administratively redundant but substantively ineffective, without allowing any increase in mercury emissions.
16. The proposed amendments therefore satisfy the statutory requirements of the Air Quality Control Act, NMSA 1978, § 74-2-5.E.

17. Pursuant to 20.1.1.300.A NMAC, any person may petition the Board for amendment of regulations within the jurisdiction of the Board.
18. On September 18, 2013, NMED filed a petition with the Board for a public hearing in this matter. See petition in Record Proper.
19. On October 8, 2013, at a meeting conducted in compliance with the Open Meetings Act and other applicable requirements, the Board granted the Department's request for a hearing.
20. On December 30, 2013, Notice of Hearing was published in the New Mexico Register. See NMED Exhibit 10-A.
21. On January 12, 2014, Notice of Hearing was published in the Albuquerque Journal (in English and Spanish). See NMED Exhibit 10-B.
22. NMED filed a Notice of Intent to Present Technical Testimony on February 27, 2014, in accordance with 20.1.1.302 NMAC.
23. A hearing was held in this matter on March 21, 2014 in Santa Fe, New Mexico.
24. The Board has the authority to approve these proposed amendments pursuant to NMSA 1978, § 74-2-5.C.
25. The notice and hearing requirements of NMSA 1978 Section 74-2-6 and 20.1.1 NMAC were satisfied in this rulemaking process.
26. The proposed amendments are adopted for any or all of the reasons stated above.

### **ORDER**

By a \_\_\_\_\_ vote of a quorum of the Board members, the proposed repeal of 20.2.85 NMAC was approved by the Board on March 21, 2014. The Department is directed to file the appropriate documents with the New Mexico State Records Center in order effectuate the repeal.

\_\_\_\_\_  
On Behalf of the Board

Dated: \_\_\_\_\_