

**STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD**

**IN THE MATTER OF PROPOSED AMENDMENTS TO
20.2.79 NMAC – *Permits - Nonattainment Areas***

**New Mexico Environment Department,
*Petitioner.***

No. EIB 21-07(R)

WRITTEN TESTIMONY OF NEAL BUTT

Witness Qualifications:

Neal Butt. Mr. Butt is an Environmental Analyst in the Control Strategies Unit of the New Mexico Environment Department's ("Department") Air Quality Bureau (AQB). He has worked in the AQB since March of 2014. Prior to this he worked for the City of Albuquerque Environmental Health Department for 17 years, the last 13 of which were as an Environmental Health Scientist in the Air Quality Division. Mr. Butt holds an M.S. Degree in Biology from the University of North Dakota, a B.S. Degree in Biology and a B.A. Degree in Environmental Planning and Design from the University of New Mexico, and an A.A.S. in Environmental Protection Technology and an A.A.S. in Criminal Justice from CNM. Mr. Butt's resume is shown as NMED Exhibit 3a.

I. Introduction / Background

On October 1, 2015, the United States Environmental Protection Agency (EPA) revised the 8-hour ozone (O₃) primary and secondary National Ambient Air Quality Standard (NAAQS), strengthening the level of the standard from 0.075 parts per million (ppm) to 0.070 ppm, to provide increased protection of public health and the environment (80 FR 65292, October 26, 2015, shown as NMED Exhibit 9a). The primary standards are set to protect human health, while secondary standards are set to protect public welfare.

Within two years of setting a new or revised NAAQS, EPA is required by the Clean Air Act (CAA) to designate areas as either meeting the standard (i.e., "attainment") or not meeting the standard (i.e., "nonattainment"). If there is not enough available information to determine an area's status, EPA may designate that area as "unclassifiable" or "attainment / unclassifiable". Nonattainment areas are classified according to the severity of their air quality problems. These

classifications are Marginal, Moderate, Serious, Severe, and Extreme, and are accompanied by progressively more stringent federal requirements to improve air quality and bring the area into compliance with the NAAQS. EPA's designations may be based on the state's recommendation using a combination of technical information, including air quality data (i.e., monitoring or modeling data), meteorology, emissions, geography/topography, and jurisdictional boundaries. Part of the state's recommendation includes proposed boundaries for any nonattainment areas.

Section 107(d)(1)(A) of the CAA requires states to submit their area designation recommendation(s) to EPA no later than one year after the promulgation of a new or revised NAAQS. The AQB submitted their designation recommendations to EPA by the October 1, 2016 deadline, using O₃ data from 2013 through 2015.

The AQB's analysis of this data showed that two monitoring sites located in southern Doña Ana County, with design values of 0.072 ppm, did not meet the standard. This area is located along the border with El Paso, Texas and Ciudad Juárez, Mexico, and is referred to as the Paso del Norte (PdN) airshed. In accordance with EPA guidance, the AQB recommended that the southeastern part of Doña County, known as Sunland Park, be designated nonattainment. Due to the disproportionate level of precursor emissions from Texas and Mexico in the PdN airshed, the AQB recommended keeping the boundary as small as possible and did not include any areas in the county where monitoring data showed that air quality was meeting the standard. EPA finalized area designations on August 3, 2018 (83 FR 25820, June 4, 2018, shown as NMED Exhibit 9b), using monitoring data from 2014-2016 that showed just one monitoring site in Sunland Park violating the standard.

After designations and classifications take effect, states are required to develop a State Implementation Plan (SIP) that details how nonattainment areas will attain and maintain the standards by reducing air pollutants. Since EPA classified the Sunland Park Ozone Nonattainment Area (SLP O₃ NAA) as Marginal, the AQB has three years to adopt their SIP and show that the area complies with the standard.

Failure to meet the standard within three years (in this case, by August 3, 2021) could result in a "bump up" in classification from Marginal to Moderate. Being bumped up to a more serious classification triggers more onerous emission control regulations, which typically entail imposition of costly new control requirements not only for large industrial facilities but also, in some cases, for a variety of smaller businesses. To avoid this bump up, the AQB has submitted to EPA a CAA 179B(b) retrospective demonstration showing international emissions contributed to violations of the 2015 O₃ NAAQS in the SLP O₃ NAA, and that the SLP O₃ NAA would be in attainment of the NAAQS but for international emissions. Without this demonstration, the SLP O₃ NAA would undergo a reclassification of nonattainment status from Marginal to Moderate, entailing additional planning requirements and emission reductions.

II. 2015 ozone NAAQS SIP Requirements Rule (2015 Ozone SRR)

The 2015 ozone NAAQS implementation rule specifies nonattainment area SIP requirements (83 FR 62998, December 6, 2018, shown as NMED Exhibit 9c). This final rule, referred to as the 2015 ozone SIP Requirements Rule (2015 Ozone SRR), is largely an update to the implementing regulations previously promulgated for the 2008 ozone NAAQS, without significant revision to the implementing provisions for the 2015 ozone NAAQS. The rule addresses a range of nonattainment area SIP requirements that New Mexico must meet for the implementation of the 2015 ozone NAAQS, including transportation conformity, nonattainment new source review (NNSR), emissions inventories and emissions statement, and timing of required SIP submissions and compliance with emission control measures in the SIP. Pursuant to the 2015 ozone SRR, AQB submitted a baseline Emissions Inventory and Emissions Statement to EPA by the specified deadline of August 3, 2020. This submission is still under review by EPA. A determination of adequacy of 20.2.79 NMAC, *Permits - Nonattainment Areas (Part 79)*, is due to EPA by August 3, 2021.

The El Paso Metropolitan Planning Organization serves as the transportation planning agency for the Sunland Park, NM area and they were required to demonstrate that the El Paso area's regional transportation plans and transportation improvement programs conform to the applicable requirements of the Clean Air Act. On July 22, 2019, the Federal Highway Administration (FHWA) acting as executive agent for the Federal Transportation Agency (FTA), issued a joint FHWA/FTA transportation conformity determination, that the El Paso Metropolitan Planning Area's Destino 2045 Metropolitan Transportation Plan and the Destino 2019-2022 Transportation Improvement Program are in conformity under the Federal Clean Air Act Amendments of 1990 (FCAA).

III. Nonattainment NSR Requirements

The basic premise of new source review (NSR) is that future emissions that result from a physical or operational change at a single stationary source of industrial air emissions (i.e., the "project") must be reviewed to ensure that the project would not result in a significant deterioration of air quality. Both the Prevention of Significant Deterioration (PSD) program for facilities located in areas that are attaining the NAAQS and the Nonattainment New Source Review (NNSR) program for facilities located in areas that are not attaining the NAAQS are covered under the umbrella of NSR. The NNSR program applies to the construction of new major stationary sources and to major modifications of existing stationary sources where such new source or modification will be located in a nonattainment area for the regulated pollutant for which the source or modification is major. In other words, the source must be major for the same regulated pollutant for which the area is designated nonattainment (i.e., ambient concentrations of that pollutant are not compliant with its NAAQS). This holds true for the secondarily formed pollutants, such as ozone. The area must be designated nonattainment for the criteria pollutant before the precursor pollutants become subject to regulation. In the case of

ozone NNSR, permit applications are evaluated based on emissions increases of the precursor pollutants, volatile organic compounds (VOC) and nitrogen oxides (NO_x).

Part 79 sets forth permitting requirements for new major stationary sources or major modifications of existing sources if those sources will be:

- a. located within a nonattainment area designated pursuant to Section 107 of the federal Clean Air Act and will emit a regulated pollutant for which it is major and which the area is designated nonattainment for; (20.2.79.109.A.(1) NMAC); or
- b. located within an area designated attainment or unclassifiable pursuant to Section 107 of the federal Clean Air Act and will emit a regulated pollutant for which the source is major and the ambient impact of such pollutant would exceed any of the significance levels identified in Subsection 20.2.79.119.A NMAC at any location that does not meet any NAAQS for the same pollutant. (20.2.79.A.(2) NMAC)

Some of these permitting requirements include:

- The new/expanding company must obtain emission credits (called offset credits) from existing sources located in the vicinity of a proposed source which (1) offset the emissions increase from the new source or modification and (2) provide a net air quality benefit. Emissions offset requirements for ozone nonattainment areas (i.e. the ratio of total actual emissions reductions of VOC to the emissions increase of VOC shall be at least 1.1:1 in any Marginal nonattainment area for O₃ (20.2.79.109.J.(1) NMAC);
- The new/expanding company must obtain a nonattainment air permit from NMED which includes installing pollution control equipment that demonstrates the company is achieving the lowest achievable emission rate (LAER). The major stationary source or major modification shall be designed such that the LAER will be met and maintained for each pollutant emitted which is subject to this rule. (20.2.79.112.A NMAC); and
- Analysis of anticipated impacts on visibility in mandatory federal Class I Areas. (20.2.79.113 NMAC);

A source subject to Part 79 must submit a permit application to the Department and cannot construct or operate the new source or modification until it receives a permit or permit revision.

As part of the effort to comply with the 2015 Ozone SRR, the AQB analyzed Part 79 to determine if it was adequate to implement and enforce the applicable portions of the 2015 Ozone SRR. Part 79 was compared with the CAA regulations at 40 C.F.R. §51.165, *Permit Requirements*, which is incorporated into Part 79, and certain inconsistencies and errors were identified; the majority of these are not substantive, however some are.

IV. Substantive Proposed Amendments to Part 79

The substantive changes include:

- a. The revision of the definition of “Nonattainment Area” at 20.2.7.AA NMAC.
AA. “Nonattainment area” means, for any air pollutant an area which is ~~[shown by monitored data or which is calculated by air quality modeling (or other methods determined by the administrator to be reliable) to exceed any national ambient air quality standard for such pollutant]~~ designated “nonattainment” with respect to that pollutant within the meaning of Section 107(d) of the federal Clean Air Act. [Such term includes any area identified under Subparagraphs (A) through (C) of Section 107(d)(1) of the federal Clean Air Act.];
- b. The addition of the sentence “Secondary emissions do not count in determining the PTE of a stationary source.” under the definition of “Potential to Emit” at 20.2.79.7.AE NMAC.
AE. “Potential to emit” means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the PTE of a stationary source.
- c. A revision to permit applicability at 20.2.79.109.A.(2) NMAC.
(2) “the major stationary source or major modification will be located within an area designated as attainment or unclassifiable for any national ambient air quality standard pursuant to Section 107 of the federal Clean Air Act, when it would cause or contribute to a violation of any national ambient air quality standard. [and will emit a regulated pollutant for which it is major and the ambient impact of such pollutant] A major source or major modification will be considered to cause or contribute to a violation of a national ambient air quality standard when such source or modification would, at a minimum, exceed any of the significance levels in Subsection A of 20.2.79.119 NMAC at any location that does not or would not meet [any national ambient air quality standard for the same pollutant] the applicable national standard. (See Subsection D of 20.2.79.109 NMAC).”; and
- d. A correction to the specifications for the fugitive emissions source category of **“fossil fuel boiler”**, at 20.2.79.119.B.(7) NMAC.
“B. Fugitive Emissions Source Categories:
(7) fossil fuel boiler (or combination thereof) totaling more than ~~[50]~~ 250 million Btu/hr heat input”.

V. Public Notice and Outreach

Stakeholder outreach was initiated on January 29, 2021, with a list serve notice sent to potentially affected parties and other stakeholders, outlining the AQB's proposal and soliciting comments, shown as NMED Exhibit # 4. No comments were received by the February 28, 2021 deadline.

AQB complied with state requirements for public notice and hearings contained in *Rulemaking Procedures - Environmental Improvement Board* at 20.1.1 NMAC, and the State Rules Act at 14-4-1, NMSA 1978. Additional outreach was conducted as outlined in the Public Involvement Plan for the Sunland Park Nonattainment Area (January 28, 2021). Public Notice of Proposed Rulemaking was provided as shown by NMED Exhibits:

- 6a. Albuquerque Journal (English and Spanish), April 18, 2021;
- 6b. Las Cruces Sun News (English and Spanish), April 18, 2021;
- 6c. Santa Fe New Mexican (English and Spanish), April 18, 2021;
- 6d. NM Register (English and Spanish), April 20, 2021;
- 6e. List Serve (English with link to Spanish-language legal ad), March 30, 2021;
- 6f. NM Legislative Council Service, March 31, 2021;
- 6g. NM Sunshine Portal, March 31, 2021;
- 6h. Land Grants, March 31, 2021;
- 6i. NMED Field Offices March 31, 2021;
- 6j. Local Government, March 31, 2021;
- 6k. Press Release to local radio stations serving Sunland Park, NM (Spanish), April 22, 2021.

This notice stated that the Board may make a decision on the proposed amendments at the conclusion of the hearing or may convene at a later date to consider action on the proposed amendments. The Department received one comment from the public, shown as NMED Exhibit 11.

EPA reviewed the proposed amendments and did not have any negative comments or suggested changes.

The Department has also complied with the Small Business Regulatory Relief Act, as shown by NMED Exhibit # 8. This Act establishes a review process, not a standard or outcome. The Department must consider the effect of the proposed rule repeal on small businesses. If the Department identifies an adverse effect, it must consider the available methods to reduce the effect, but even if there are no such methods, the Board may approve the proposed rule amendments to accomplish the objectives of the applicable law. The Department does not foresee that the proposed amendments to Part 79 will have an adverse impact on the citizens or businesses of New Mexico.

VI. Conclusion

The Board has the authority to adopt the proposed amendments pursuant to NMSA 1978, §§74-2-5 B & C.

In considering the proposed amendments, the Board is required by the Air Quality Control Act, NMSA 1978, §74-2-5.E, to give 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.

The proposed amendments will not cause injury or interfere with health, welfare, visibility and property, in accordance with NMSA, §74-2-5.E(1). In addition, in accordance with NMSA, §74-2-5.E(2), the Department concludes that the public interest will be served by implementation of the proposed amendments by aligning Part 79 with the CFR ensuring the ability to enforce the 2015 ozone NAAQS. Finally, the proposed amendments require no new technology and, with no cost associated with the amendments, are economically reasonable, in accordance with NMSA, §74-2-5.E(3).

The Department concludes that the factors specified by NMSA 1978, §74-2-5.E all weigh in favor of adopting the proposed amendments.

This concludes my testimony before the Environmental Improvement Board on the proposed amendments to Part 79. I respectfully request that the Board adopt the proposed amendments and SIP revision at the conclusion of this hearing.