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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)

NOTICE OF SUBSTITUTION OF EXHIBIT

The Air Quality Bureau of the New Mexico Environment Department (“Department”) hereby provides notice of its intent to substitute the attached amended Exhibit 11 for the original version in the Departments Notice of Intent to Present Technical Testimony. The original version of Exhibit 11 was incomplete, and the amended version corrects this error. The Department will move the admission of the amended Exhibit during the hearing on this matter, currently scheduled for June 25, 2021.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT

Andrew Knight Digitally signed by Andrew Knight
Date: 2021.06.17 14:29:18 -06'00

Andrew P. Knight
Assistant General Counsel
1190 St. Francis Drive
Santa Fe, New Mexico 87505
Telephone: (505) 470-8215
Email: andrew.knight@state.nm.us

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2021, a true and correct copy of the foregoing Notice of Substitution of Exhibit was served via electronic mail on the following:

Karla Soloria
New Mexico Attorney General's Office
P.O. Drawer 1508
Santa Fe, NM 87504
ksoloria@nmag.gov
Counsel for the Environmental Improvement Board

Daniel Timmons
Staff Attorney
Wild Earth Guardians
301 N. Guadalupe Street, Suite 201
Santa Fe, NM 87501
dtimmons@wildearthguardians.org

Pamela Jones
Administrator - Environmental Improvement Board
Harold Runnels Building
1190 St. Francis Drive, Rm. 2100
P.O. Box 5469
Santa Fe, NM 87502
Pamela.Jones@state.nm.us

/s/ Andrew P. Knight
Andrew P. Knight

From: [Daniel Timmons](#)
To: [Knight, Andrew, NMENV](#); [Butt, Neal, NMENV](#)
Cc: [Matthew Nykiel](#); [ksoloria](#)
Subject: [EXT] Re: EIB No. 21-07 - Public Notice Issues
Date: Friday, May 28, 2021 10:53:13 AM
Attachments: [Guardians Redline.docx](#)
[EPA SIL Guidance.pdf](#)

Hi Andrew,

I wanted to follow up on our conversation from last week regarding NMED's proposed changes to 20.2.79 NMAC (EIB No. 21-07).

First, I want to reiterate my concern regarding the public notice provided for this proceeding. In addition to not directly emailing the public notice to myself or Mr. Nykiel, despite our entries of appearance in this proceeding, the public notice was also not put up on the EIB's website in a timely manner. While I understand that the May 21 comment deadline is not a regulatory requirement, the rules do require public notice on the EIB's website at least 60 days prior to hearing. 20.1.1.301 NMAC (requiring 60 days public notice); 20.1.1.6.N NMAC (defining "provide to the public" as including posting on the Board's website and emailing to rulemaking participants). The Board's failure to meet this obligation does not simply affect Guardians, but the public at large. Accordingly, we believe it would be appropriate to extend the date of the hearing and provide supplemental notice as needed to meet the applicable requirements.

Second, regarding the substance of the rule, Guardians remains concerned that the amended language at [20.2.79.109](#) could be misinterpreted as excluding ozone from the "cause or contribute" analysis required by statute. As we discussed, because there is no significant ambient concentration established by rule, the rule could be read to imply that the cause or contribute standard does not apply to ozone. The regulations, of course, require permit denial where a new facility will cause or contribute to any NAAQS exceedance, which includes ozone. 20.2.72.208.D NMAC. Our concern regarding the potential misinterpretation of the proposed language is exacerbated by the Board's recent decision indicating that the Department lacks the authority to deny minor source permits based on ozone impacts. EIB No. 20-21. I am attaching redline language that attempts to clarify that ozone is still subject to the cause or contribute standard, which should be evaluated on a case-by-case basis absent a regulatory significant ambient concentration. This approach comports both with the regulations as well as applicable EPA guidance regarding Significant Impact Levels for PM2.5 and ozone, which I am also attaching for your reference.

Thank you for your consideration of these comments and the attached redline edits.

I am available to discuss at your convenience.

-DLT



Staff Attorney

He/Him

[\(505\) 570-7014](tel:5055707014)

www.wildearthguardians.org



On Thu, May 20, 2021 at 2:03 PM Daniel Timmons <dtimmons@wildearthguardians.org> wrote:

Mr. Knight,

I wanted to reach out regarding NMED's proposed amendments to NMAC 20.2.79 regarding nonattainment areas.

Specifically, I wanted to flag that I just learned yesterday that the public notice for the June 25th hearing was published in the newspaper on April 18th. I'm surprised that Guardians was not provided this notice directly, given our prior entry of appearance into the rulemaking proceeding. And I'm also concerned that the public notice does not appear to have been placed on the EIB's website. Instead, the link from the EIB's public notice page for EIB No. 21-07 simply redirects to your initial petition. <https://www.env.nm.gov/environmental-improvement/public-notices-2/> Because of this, I don't anticipate being able to provide NMED with written comments prior to the requested comment deadline, tomorrow (May 21). It also appears that the lack of public notice on the Board's website and directly to Guardians may violate the rulemaking procedures at 20.1.1 NMAC and justify an extension of the hearing to a later date.

If you're available tomorrow between 12:30 and 3:30, I'd love to discuss this issue with you, as well as flag Guardians' substantive concerns with the proposal - which generally relate to the treatment of ozone absent a regulatory significant ambient concentration. I'm also generally early next week if tomorrow doesn't work.

Thank you.

-Daniel Timmons



Staff Attorney

He/Him

(505) 570-7014

www.wildearthguardians.org



20.2.79.109 APPLICABILITY:

A. Any person constructing any new major stationary source or major modification shall obtain a permit from the department in accordance with the requirements of this part prior to the start of construction or modification if either of the following conditions apply:

(1) the major stationary source or major modification will be located within a nonattainment area so 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; or

(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. A major source or major modification will be considered to cause or contribute to a violation of a national ambient air quality standard other than the ozone 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 the applicable national standard. (See Subsection D of 20.2.79.109 NMAC). For any major stationary source or major modification that is major for ozone (as defined in 20.2.74.7 AG NMAC) and will be located within an area designated as attainment or unclassifiable for ozone, a case-by-case determination shall be made to determine whether it would cause or contribute to a violation of the ozone standard.

B. The requirements of this part apply to each regulated pollutant meeting the criteria of either Paragraph (1) or Paragraph (2) of Subsection A of 20.2.79.109 NMAC.

C. For an area which is nonattainment for ozone, volatile organic compounds and oxides of nitrogen are the regulated pollutants which may make this part applicable under the provisions of Paragraph (1) of Subsection A of 20.2.79.109 NMAC.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

APR 17 2018

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program

FROM: Peter Tsirigotis
Director

TO: Regional Air Division Directors, Regions 1-10

The purpose of the attached document is to provide guidance on compliance demonstration tools for use with ozone and fine particles (PM_{2.5}) in the Prevention of Significant Deterioration (PSD) permitting program. The Environmental Protection Agency (EPA) has developed a new analytical approach and has used it to identify a significant impact level (SIL) for each ozone and PM_{2.5} National Ambient Air Quality Standard (NAAQS) and for the PM_{2.5} PSD increments. Permitting authorities may use these values to help determine whether a proposed PSD source causes or contributes to a violation of the corresponding NAAQS or PSD increments. Separately, we have developed a technical document that provides a detailed discussion of the technical analysis used in the development of these values and a legal memorandum that provides further detail on the legal basis that permitting authorities may choose to adopt to support using SILs to show that requirements for obtaining a PSD permit are satisfied.¹ This guidance provides a summary of the results of the technical analysis and information on the particular points in the PSD air quality analysis at which permitting authorities may decide to use these values on a case-by-case basis in the review of PSD permit applications. This guidance, and the technical and legal documents, are not final agency actions and do not create any binding requirements on permitting authorities, permit applicants or the public.

Please share this guidance with permitting authorities in your Region. If you have questions regarding the guidance, please contact Raj Rao at rao.raj@epa.gov or (919) 541-5344. For questions regarding the technical document, please contact Tyler Fox at fox.tyler@epa.gov or (919) 541-5562. For questions regarding the legal document, please contact Brian Doster at doster.brian@epa.gov or (202) 564-1932.

Attachment

¹ "Technical Basis for the EPA's Development of Significant Impact Thresholds for PM_{2.5} and Ozone," EPA-454/R-18-001, April 2018; "Legal Memorandum: Application of Significant Impact Levels in the Air Quality Demonstration for Prevention of Significant Deterioration Permitting under the Clean Air Act," April 2018.

Attachment

Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program

I. INTRODUCTION

When a Prevention of Significant Deterioration (PSD) permit applicant has shown through air quality modeling that the projected air quality impact from a proposed source for a particular pollutant is not significant or meaningful, the EPA believes there is a valid analytical and legal basis in most cases for the permitting authority to conclude that the proposed source will not cause or contribute to a violation of a National Ambient Air Quality Standard (NAAQS) or PSD increment for that pollutant. To show that the proposed source will not have a significant or meaningful impact on air quality, permit applicants and permitting authorities may elect to use these Significant Impact Level (SIL) values (air quality concentration values) as a compliance demonstration tool. In this guidance and accompanying documents, the EPA has provided policy, technical and legal analyses that permitting authorities may choose to adopt in supporting the use of the SILs to make the required demonstration in particular PSD permitting actions. The use of SILs can help satisfy PSD requirements while expediting the permitting process and conserving resources for permit applicants and permitting authorities.

The EPA has previously issued guidance describing particular uses of SILs.^{1,2,3,4} The EPA has also recognized that permitting authorities have the discretion to apply SILs on a case-by-case basis in the review of individual permit applications, provided such use is justified in the permitting record.⁵ In an effort to reduce the need for case-by-case justification by permitting authorities, the EPA finalized a rule in 2010 to codify, among other things, particular PM_{2.5} SIL values and specific

¹ Memorandum from Stephen D. Page, EPA OAQPS, to EPA Regional Air Division Directors, "Guidance Concerning the Implementation of the 1-hour SO₂ NAAQS for the Prevention of Significant Deterioration Program," August 23, 2010.

² Memorandum from Stephen D. Page, EPA OAQPS, to EPA Regional Air Division Directors, "Guidance Concerning the Implementation of the 1-hour NO₂ NAAQS for the Prevention of Significant Deterioration Program," June 29, 2010.

³ Memorandum from Stephen D. Page, EPA OAQPS, to OAQPS Personnel and EPA Regional Modelers, "Modeling Procedures for Demonstrating Compliance with PM_{2.5} NAAQS," March 23, 2010.

⁴ Memorandum from Gerald A. Emison, EPA OAQPS, to Thomas J. Maslany, EPA Air Management Division, EPA Region 3, "Air Quality Analysis for Prevention of Significant Deterioration (PSD)," July 5, 1988.

⁵ Order Responding to Petitioner's Request that the Administrator Object to Issuance of a State Operating Permit, *In the Matter of CF&I Steel, L.P. dba EVRAZ Rocky Mountain Steel*, Petition Number VIII-2011-01, at 15-17 (May 31, 2012) ("Rocky Mountain Steel Order"); *In re: Mississippi Lime Company*, 15 E.A.D. 349, 375-379 (Environmental Appeals Board (EAB) 2011).

applications of those values (“2010 rulemaking”).⁶ However, in the course of subsequent litigation over this rule, the EPA conceded the regulation was flawed because it did not preserve the discretion of permitting authorities to require additional analysis in certain circumstances, and the court granted the EPA’s request to vacate and remand the rule so that the EPA could address the flaw.⁷

Following the litigation, the EPA began developing a new rule to address the flaw identified in the 2010 rulemaking.⁸ However, after further evaluation and the identification of a revised set of SIL values based on the technical and legal analyses described below, the EPA believes it should first obtain experience with the application of these values in the permitting program before establishing a generally applicable rule.⁹ Thus, the EPA intends at this point to take a two-step approach.

First, the EPA is providing non-binding guidance so that we may gain valuable experience and information as permitting authorities use their discretion to apply and justify the application of the SIL values identified below on a case-by-case basis in the context of individual permitting decisions. We will be seeking to learn generally about permitting agencies’ experiences in applying SILs in particular PSD permitting decisions. We will also be seeking more specific information, including how often and in what types of settings the application of a SIL at the single-source assessment and cumulative assessment stages of the PSD air quality analysis has made a critical difference in whether a conclusion was reached that the proposed source will not cause or contribute to a NAAQS or PSD increment violation. The EPA intends to obtain this information through its own PSD permitting activities in states that do not have SIP-approved PSD programs, regular discussions between our Regional offices and air agencies, regular conference calls with the permitting committees of national organizations of air agencies, and technical conferences of air quality modelers and others interested in permitting activities.

Second, the EPA will use this experience and information to assess, refine and, as appropriate, codify SIL values and specific applications of those values in a future, potentially binding rulemaking. During this second step, to assess whether it is appropriate to codify particular SIL

⁶ 75 FR 64864 (October 20, 2010).

⁷ *Sierra Club v. EPA*, 705 F.3d 458, 463-66 (D.C. Cir. 2013). In its litigation brief at n. 10, the EPA stated an intent to issue guidance in the near future concerning PM_{2.5} values remaining in 40 CFR 51.165(b)(2). The EPA issued such guidance in May 2014. Memorandum from Stephen D. Page, EPA OAQPS, to EPA Regional Air Division Directors, “Guidance for PM_{2.5} Permit Modeling,” May 20, 2014.

⁸ Fall 2015 Regulatory Agenda, USEPA, 80 FR 78024, December 15, 2015. Ozone and Fine Particulate Matter (PM_{2.5}) Significant Impact Levels (SILs) for Prevention of Significant Deterioration (PSD), RIN: 2060-AR28. <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=2060-AR28>.

⁹ See *SEC v. Chenery Corp.*, 332 U.S. 194, 199-203 (1947) (recognizing that some principles may warrant further development before they are ready to be codified in a rule of general applicability).

values for ozone and PM_{2.5}, the EPA will consider whether permitting experience has confirmed that the recommended SIL values are suitable in all circumstances to show that an increase in air quality concentration below the value does not cause or contribute to a violation of the NAAQS or PSD increments.

Permitting authorities retain discretion to use or not to use these EPA-derived SILs in particular PSD permitting actions. If a permitting authority chooses to use these SIL values to support a case-by-case permitting decision, it must justify the values and their use in the administrative record for the permitting action.¹⁰ Permitting authorities also have discretion to develop their own SIL values, provided that such values are properly supported in the record for permitting actions or decisions in which the values are used to make the required showing. Detailed technical guidance on the development of alternative SIL values is beyond the scope of this document; however, we provide a limited discussion later in this document (*see, e.g.*, page 12). This guidance (including the legal and technical documents) supporting the EPA's recommended SIL values may be viewed as a model for permitting authorities that seek to develop alternative SIL values. Permitting authorities may elect to utilize alternative "confidence intervals" as well as regional or local factors in developing their own SIL values.¹¹

Since the 2010 rulemaking, the EPA has examined the legal basis for using SIL values in PSD air quality impact analyses. In addition, the EPA has sought to develop a stronger analytical foundation for the EPA recommended SIL values. This guidance and supporting documents are the products of this effort. They identify specific SIL values for ozone and PM_{2.5} and provide a supporting justification that permitting authorities may choose to apply on a case-by-case basis. The values and supporting justification are designed so that permitting authorities can choose to apply the SIL values to demonstrate that a proposed source does not cause or contribute to a violation of NAAQS or PSD increments. In contrast to the 2010 rulemaking, we have developed separate SIL values for the PM_{2.5} NAAQS and PSD increments, and we have developed SILs for the ozone NAAQS. Since there are no PSD increments for ozone, the EPA has not developed SILs for ozone.

The EPA believes that the application of these SILs in the manner described below would be sufficient in most situations for a permitting authority to conclude that a proposed source will not cause or contribute to a violation of an ozone or PM_{2.5} NAAQS or PM_{2.5} PSD increments. However, this guidance is not a final agency action and does not reflect a final determination by the EPA that any particular proposed source with a projected impact below the recommended SIL value does not cause or contribute to a violation. A determination that a proposed source does not cause or contribute to a violation can only be made by a permitting authority on a permit-specific basis after consideration of the permit record. This guidance is not legally binding and does not affect the rights or obligations of permit applicants, permitting authorities, or others. The SIL

¹⁰ *Rocky Mountain Steel Order* at 16-18, *supra* footnote 5. Such a justification may incorporate the information compiled by the EPA to support the SILs recommended in this memorandum.

¹¹ A description of the "confidence interval" is provided at page 12 of this document and in the technical document at section 2.2 (Statistical Methods and Assessing Significance Using Confidence Intervals).

values identified by the EPA have no practical effect unless and until permitting authorities decide to use those values in particular permitting actions. The experience of permitting authorities using these SILs on a case-by-case basis, or in choosing to limit or forego their use in specific situations, will be valuable information for the EPA to consider in a future rulemaking. Permitting authorities retain the discretion to apply and justify different approaches and to require additional information from the permit applicant to make the required air quality impact demonstration, consistent with the relevant PSD permitting requirements.

II. BACKGROUND

A PSD permit applicant must demonstrate that “emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any” NAAQS or PSD increment.¹² The EPA has reflected this requirement in its PSD regulations.¹³ The Clean Air Act (Act) does not specify how a permit applicant or permitting authority is to make this demonstration, but section 165(e) authorizes the EPA to determine how the analysis is to be conducted, including the use of air quality models. In accordance with this authority, the EPA has promulgated regulations that identify such models and the conditions under which they may be used in the PSD program to make the demonstration required under the Act.¹⁴

Using the models identified in the EPA’s regulations, there are two basic ways that a PSD permit applicant can demonstrate that the proposed source’s emissions will not cause or contribute to a violation of a NAAQS or PSD increment. One way is to demonstrate that no such violation is occurring or projected to occur in the area affected by the emissions from the proposed source.¹⁵ A second way is to demonstrate that the emissions from the proposed source do not cause or contribute to any identified violation of the NAAQS or PSD increments.¹⁶

The Act does not define “cause” or “contribute.” Reading these terms in context, the EPA has historically interpreted this provision in section 165(a)(3) of the Act and associated regulations to mean that a source must have a “significant impact” on ambient air quality in order to cause or contribute to a violation.¹⁷ Thus, the EPA and other permitting authorities have concluded that a

¹² 42 U.S.C. 7475(a)(3) (section 165(a)(3) of the Act). The EPA interprets the phrase “in excess of” to mean a violation, not the exceedance described in 40 CFR 50.1(l).

¹³ 40 CFR 51.166(k); 40 CFR 52.21(k).

¹⁴ The PSD regulations at 40 CFR 51.166(l) and 52.21(l) require the use of “applicable models, data bases, and other requirements” specified in 40 CFR part 51, Appendix W, also known as the *Guideline on Air Quality Models (Guideline)*.

¹⁵ 1990 Draft New Source Review (NSR) Workshop Manual at C.51.

¹⁶ 40 CFR part 51, App. W, § 9.2.3; 1990 Draft NSR Workshop Manual at C.52.

¹⁷ *In re: Prairie State Generating Co.*, 13 E.A.D. 1, 105 (EAB 2006). This EAB opinion includes a long discussion of the EPA’s prior guidance with other examples.

proposed source may meet the requirements in section 165(a)(3) and the EPA's PSD regulations by showing that its projected impact on air quality at the site of a modeled violation is below a level of air quality impact considered to be significant.¹⁸

Historic Use of SILs

In the context of section 165(a)(3), the EPA has historically used pollutant-specific concentration levels known as "significant impact levels" to identify the degree of air quality impact that "causes, or contributes to" a violation of a NAAQS or PSD increment.¹⁹ Consistent with the EPA guidance, proposed sources have met the requirement to demonstrate that they do not cause or contribute to a violation by showing that the ambient air quality impacts resulting from the proposed source's emissions would be below these concentration levels.²⁰ The SIL values have served as a compliance demonstration tool to make the required demonstration in the PSD program. They have helped to reduce the burden on permitting authorities and permit applicants to conduct often time-consuming and resource-intensive air dispersion modeling where such modeling was unnecessary to demonstrate that a permit applicant meets the requirements of section 165(a)(3), consistent with the procedures set forth originally in 1977 in the "Guidelines for Air Quality Maintenance Planning and Analysis, Volume 10 (Revised) and Procedures for Evaluating Air Quality Impact of New Stationary Sources."²¹

Recent Status of SILs for Ozone and PM_{2.5}

Since the inception of the PSD program, the EPA has faced technical challenges with providing compliance demonstration tools for those pollutants that are not directly emitted by sources (ozone and secondarily-formed PM_{2.5}) and which form through chemical reactions of precursor pollutants. In July 2010, the Sierra Club petitioned the EPA to initiate rulemaking regarding the establishment of air quality models for ozone and PM_{2.5} for use by PSD permit applicants. In January 2012, the EPA granted the petition and committed to engage in rulemaking to evaluate whether updates to the *Guideline* are warranted and, as appropriate, incorporate new analytical techniques or models for ozone and secondarily-formed PM_{2.5}. In granting the petition, the EPA explained that the "complex chemistry of ozone and secondary formation of PM_{2.5} are well-documented and have historically presented significant challenges to the designation of particular models for assessing

¹⁸ 1990 Draft NSR Workshop Manual at C.52.

¹⁹ 61 FR 38250, 38293 (July 23, 1996); 72 FR 54112, 54139 (September 21, 2007).

²⁰ 1990 Draft NSR Workshop Manual at C.51-C.52.

²¹ October 1977, U.S. EPA, Office of Air Quality Planning and Standards, Research Triangle Park, NC 27711. The 1977 document did not discuss SILs, but did identify procedures for air quality analyses pursuant to the PSD program.

the impacts of individual stationary sources on the formation of these air pollutants”²² Because of these considerations, the EPA’s past judgment had been that it was not technically sound to designate with particularity specific models that must be used to assess the impacts of a single source on ozone and secondarily-formed PM_{2.5} concentrations. Instead, the EPA established a consultation process with permitting authorities for determining (on a permit-specific basis) the analytical techniques that should be used for single-source analyses for both ozone and secondarily-formed PM_{2.5}.

The EPA has responded to the Sierra Club petition by finalizing revisions to the EPA’s *Guideline*.²³ As discussed in the preamble to the *Guideline*, recent technical advances have made it reasonable for the EPA to provide more specific guidelines that identify appropriate analytical techniques or models that may be used in compliance demonstrations for the ozone and PM_{2.5} NAAQS and PM_{2.5} PSD increments. The revisions to the *Guideline* include criteria and process steps for choosing single-source analytical techniques or models to estimate ozone impacts from precursor nitrogen oxide (NO_x) and volatile organic compound (VOC) emissions and to assess concentrations of direct and secondarily-formed PM_{2.5}. The ozone and PM_{2.5} SIL values recommended in this guidance are intended to complement the *Guideline* updates by providing thresholds that may be used to determine whether an increase in air pollutant concentration (impact) predicted by the chosen technique or model causes or contributes to a violation.

In the 2010 rulemaking, the EPA established SIL values for PM_{2.5} in paragraph (k)(2) of the PSD regulations at 40 CFR 51.166 and 52.21. In January 2013, the U.S. Court of Appeals for the District of Columbia Circuit granted the EPA’s request to vacate and remand the paragraph (k)(2) provision in both PSD regulations so the EPA could correct them.²⁴ Paragraph (k)(2) as promulgated in 2010 included numerical values of PM_{2.5} SILs and statements about their role in completing an air quality impact analysis with regard to the PM_{2.5} NAAQS and PSD increments. Specifically, the 52.21(k)(2) rule text stated that if the impact of a proposed source seeking a federal PSD permit was below the relevant SIL value(s), then the proposed source would be deemed to not cause or contribute to a violation. The 51.166(k)(2) rule text stated that a state’s PSD rules could contain a similar provision. The EPA asked the court to vacate and remand the (k)(2) paragraphs of both PSD regulations so that the EPA could correct an inconsistency between (1) that rule text, which left no discretion for the permitting authority, and (2) our statements in the preamble to the 2010 rulemaking, which identified certain circumstances where it may not be

²² Letter from Gina McCarthy, Assistant Administrator, EPA Office of Air and Radiation, to Robert Ukeiley, Sierra Club, January 4, 2012.

²³ 82 FR 5182 (January 17, 2017).

²⁴ *Sierra Club v. EPA*, 705 F.3d 458, 466 (D.C. Cir. 2013).

appropriate for a permitting authority to rely solely on the PM_{2.5} SILs as a basis for concluding that a proposed source does not cause or contribute to a violation.²⁵

The court left intact the PM_{2.5} NAAQS significance levels separately promulgated at 40 CFR 51.165(b)(2), because the regulatory text in that section did not say that a proposed source that has an impact less than the significance level is always deemed to not cause or contribute to a violation. The regulatory text at 40 CFR 51.165(b)(2) says that a major source or major modification with a projected impact greater than the listed significance level at any location that does not or would not meet the applicable NAAQS will be considered to cause or contribute to a violation, but this provision does not compel the opposite conclusion for projected impacts equal to or below that level.²⁶

III. RECOMMENDED SIL VALUES FOR USE IN AIR QUALITY IMPACT DEMONSTRATION REQUIRED TO OBTAIN A PSD PERMIT

As discussed above, the EPA has interpreted the phrase “cause, or contribute to” in section 165(a)(3) of the Act to mean that a proposed source will have a “significant impact” on air pollutant concentrations that violate the standards. In this context, the EPA believes permitting authorities may read the phrase “cause, or contribute to” in section 165(a)(3) to be inapplicable to an air quality impact that is insignificant. This interpretation is more fully explained in the legal memorandum. In the context of this section of the Act, the EPA believes an insignificant impact is an impact on air quality concentrations that is small and not meaningful (e.g., the EPA has often described such an impact as “trivial” or “*de minimis*”).

As discussed in more detail in the legal memorandum, a permitting authority may conclude that a PSD permit applicant will “cause” a modeled violation of a NAAQS when the increased emissions from construction or modification of the proposed source are the reason for, responsible for, or the “but for” cause of the violation. However, a permitting authority must also consider whether emissions “contribute” to a violation in circumstances where a violation of the NAAQS is present before considering the proposed increase in emissions from a PSD construction project, or when

²⁵ These preamble statements were the following: “[N]otwithstanding the existence of a SIL, permitting authorities should determine when it may be appropriate to conclude that even a *de minimis* impact will ‘cause or contribute to’ an air quality problem and to seek remedial action from the proposed new source or modification.” See 75 FR 64864, 64892. “[T]he use of a SIL may not be appropriate when a substantial portion of any NAAQS or increment is known to be consumed.” See 75 FR 64864, 64894. “[W]e earlier provided an example of when it might be appropriate to require a modified source to mitigate its contribution to a violation of a NAAQS or increment even when the predicted ambient impact of the proposed emissions increase would result in what is normally considered to be *de minimis*.” See 75 FR 64864, 64894.

²⁶ 40 CFR 51.165(b)(2) is phrased such that an impact equal to the listed value is treated the same as impacts below the listed value. This contrasts to the approach in former 40 CFR 51.166(k)(2) and 52.21(k)(2), and, in this guidance, that an impact equal to the SIL is treated the same as impacts above the SIL.

emissions from multiple sources may impact a particular area. In the absence of specific language in section 165(a)(3) regarding the degree of contribution that is required (such as the term “significantly”), a permitting authority has the discretion under this provision to exercise its judgment to determine the degree of impact that contributes to adverse air quality conditions based on the particular context in which the term contribute is used. A permitting authority may also identify criteria or factors that may be used to determine whether something contributes, including qualitative or quantitative criteria that are appropriate to the particular context.²⁷

For purposes of implementing section 165(a)(3) of the Act, the EPA has found it more expedient and practical to use a quantitative threshold (expressed as a level of change in air quality concentration) to determine whether increased emissions from proposed construction or modification of a source will cause or contribute to air quality concentrations in violation of applicable standards. One of the goals of the development of SILs as a compliance demonstration tool is to ensure an appropriate balance between maintenance of air quality and PSD permit process streamlining. The EPA believes that the permitting process can be streamlined without compromising air quality if the EPA and permitting authorities are able to identify a quantitative threshold or dividing line between an insignificant and a significant impact on air pollutant concentrations. Using a quantitative threshold for this purpose is permissible as long as the EPA or the appropriate permitting authority provides a reasoned explanation for why impacts below that value do not cause or contribute to a violation in a particular context.

Historical Approach for Developing SILs

To determine what is (and is not) a significant impact in the context of section 165(a)(3) of the Act, the EPA has previously supported using the levels in 40 CFR 51.165(b)(2).²⁸ The EPA has

²⁷ See *Catawba County, N.C. v. EPA*, 571 F.3d 20, 39 (D.C. Cir. 2009). In this case interpreting the term “contributes” in section 107(d) of the Act, the court held that the EPA is not required to establish a quantitative or objective, bright-line test to define a contribution by sources to adverse air quality conditions in a nearby area in the context of designations with respect to attainment of a NAAQS. The court recognized that the EPA has the discretion to use a totality-of-the-circumstances test if the Agency defines and explains the criteria that it is applying. While this opinion said that a quantified threshold is not required to define “contribution” in the context of section 107(d), the court’s reasoning does not preclude PSD permitting authorities from choosing to use a quantitative level of impact to represent a contribution to a violation of the NAAQS or PSD increment when implementing section 165(a)(3) of the Act.

²⁸ The Emison Memo, *supra* footnote 5, references 40 CFR 51.165(b)(2) for the purpose of defining “significant” in this context. The NSR Workshop Manual at C.26-C.28 lists values from 40 CFR 51.165(b)(2) for the purpose of defining the area of “significant ambient impact.”

described these levels as “significance levels.”²⁹ 40 CFR 51.165(b)(2) was originally promulgated by the EPA in 1987 as part of an offset provision permitting authorities could apply after it was determined that construction at a stationary source was predicted to cause or contribute to a violation of the NAAQS.³⁰ This regulation provides that a proposed source planning to locate in an attainment area will be considered to “cause or contribute to” a violation of the NAAQS if its impact would exceed specific values identified in the regulation. For example, 40 CFR 51.165(b)(2) states that a proposed source impact that is greater than 5 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) for the 24-hour sulfur dioxide (SO_2) NAAQS causes or contributes to a violation of that NAAQS. The section refers to these values as “significance levels.” Values are not provided for every NAAQS, particularly ozone (and not for $\text{PM}_{2.5}$ until the 2010 rulemaking), but for those NAAQS covered in this regulation, the application is the same. Over time, these air quality concentration significance levels in 40 CFR 51.165(b)(2) have become known as “significant impact levels”³¹ [emphasis added] in order to distinguish them from the significant *emissions rates* reflected in the definition of the term “significant,” which serve a different function in the PSD program.³² The EPA has also issued guidance memoranda that have provided recommended SIL values for the 1-hour nitrogen dioxide (NO_2) and SO_2 NAAQS, to be used for the purpose of determining what are (and are not) significant impacts for these pollutants in the context of the 1-hour standards.³³

As referenced above, the EPA’s values contained in 40 CFR 51.165(b)(2) originally were related to the level of protection afforded by the PSD increments that Congress established for Class I areas.³⁴ The EPA generally relied on that approach in 2010 by using the ratio of the $\text{PM}_{2.5}$ NAAQS

²⁹ The EPA initially promulgated these same concentration values in 1978 and described them as the “minimum amount of ambient impact that is significant.” 43 FR 26380, 26398 (June 19, 1978). In the 1979 Emissions Offset Interpretative Ruling (Appendix S to 40 CFR part 51), the EPA used these values as the “significance levels” under which a source locating in the “clean” portion of a nonattainment area may be exempt from the preconstruction review requirements. 44 FR 3274, 3283 (January 16, 1979). Under Appendix S, as revised in 1980, the EPA considered a source to “cause or contribute to” a violation if the impact of the source or modification would exceed these significance levels at any locality that does not meet the NAAQS. 45 FR 31307, 31311 (May 13, 1980).

³⁰ 52 FR 24672, 24713 (July 1, 1987).

³¹ The first reference to “significant impact levels” is in the 1980 NSR Workshop Manual, which the EPA subsequently updated in the 1990 draft. It is worth noting that the 1977 comments to the proposed Appendix W rule (45 FR 58543) addressed whether a single-source screening technique should be used to determine if a cumulative modeling analysis would be required in a preconstruction review; industry and state agency comments indicated both groups favored some use of a tool to alleviate resource burden.

³² 40 CFR 52.21(b)(23) defines the term “significant” and applies discrete values for determining if the emissions increase from a proposed source will be significant. This regulation states that an increase in emissions of each ozone precursor (VOC and NO_x) is significant if it equals or exceeds 40 tons per year (tpy) and, for direct emissions of $\text{PM}_{2.5}$ the significance level is 10 tpy. For $\text{PM}_{2.5}$ precursor emissions, the significance level is 40 tpy for SO_2 and 40 tpy for NO_x .

³³ Page memoranda, *supra* footnotes 1 and 2 of this attachment.

³⁴ 43 FR 26380, 26398.

to the particulate matter 10 micrometers or less in diameter (PM₁₀) NAAQS as a multiplier to add PM_{2.5} values to 40 CFR 51.165(b)(2) and to establish PM_{2.5} SIL values in 40 CFR 51.166(k)(2) and 52.21(k)(2).³⁵ However, given limitations in the rationale supporting them, the EPA recognized in the preamble to the 2010 rulemaking that a permitting authority may not be able to apply the SIL values derived through this approach in every situation to show that proposed construction does not cause or contribute to a violation of standards. The EPA acknowledged that “the use of a SIL may not be appropriate when a substantial portion of any NAAQS or increment is known to be consumed.” The EPA also said that “notwithstanding the existence of a SIL, permitting authorities should determine when it may be appropriate to conclude that even a *de minimis* impact will ‘cause or contribute to’ an air quality problem and to seek remedial action from the proposed new source or modification.”³⁶ To guard against the improper use of the 2010 SILs for PM_{2.5} in such circumstances, the EPA later recommended that permitting authorities use those SILs only where they could establish that the difference between background concentrations in a particular area and the NAAQS was greater than those SIL values.³⁷ This approach was intended to guard against misuse of the SILs in situations where the existing air quality was already close to the NAAQS.

Analytical Foundation for Recommended SILs

Since the May 2014 PM_{2.5} modeling guidance was issued, the EPA has conducted a statistical analysis that provides an improved analytical foundation for the EPA’s selection, based on the policy considerations described below, of a degree of change in concentration that permitting authorities may use to represent an insignificant impact on air pollutant concentrations for ozone and PM_{2.5} in the context of PSD permitting. This technical method, referred to as the air quality variability approach, is described in the technical document. Given the improvements reflected in this method, the EPA does not see a need for permitting authorities to show that the difference between background concentrations and the relevant NAAQS is greater than the SIL value before applying one of the recommended PM_{2.5} SIL values. The EPA’s intention with this new method was to derive SIL values that are more universally applicable to a range of conditions, including those where a substantial portion of the NAAQS or PSD increment is known to be consumed. However, permitting authorities retain discretion whether to apply SILs as a general matter, or in particular permitting actions, based on information in the permit record.

In order for a specific change in air quality concentrations to be used to show that a proposed source does not cause or contribute to a violation of the NAAQS, the concentration change must

³⁵ 75 FR 64890.

³⁶ 75 FR 64864, 64892.

³⁷ Memorandum from Stephen D. Page, EPA OAQPS, to EPA Regional Air Division Directors, “Guidance for PM_{2.5} Permit Modeling,” May 20, 2014.

represent a level of impact on ambient air quality that is not significant or meaningful. The EPA's judgment is that values representing such a level can be selected from a statistical analysis of the variability of air quality, using data from the U.S. ambient monitoring network for ozone and PM_{2.5}. Due to fluctuating meteorological conditions and changes in day-to-day operations of all air pollution sources in an area, there is an inherent variability in the air quality in the area surrounding a monitoring site. This variability can be characterized through the application of a well-established statistical framework for quantifying uncertainty.^{38,39} The analysis described in the technical document quantifies the inherent variability in pollutant concentrations (as measured by design values) and informs the EPA's choice of a value for a change in concentrations that the EPA does not consider significant or meaningful because changes of this magnitude are well within the inherent variability of observed design values.⁴⁰ Once the precautionary choices described below are built into the calculation, this degree of change in concentration is, thus, indistinguishable from the inherent variability in the measured atmosphere and may be observed even in the absence of the increased emissions from a new or modified source. Therefore, a permitting authority can reasonably conclude that emissions of a proposed source that have a projected impact below the SIL values provided in this memorandum are not the reason for, responsible for, or the "but for" cause of a NAAQS violation. Likewise, this indicates that changes in air quality within this range are not meaningful, and, thus, do not contribute to a violation of the NAAQS.

Before delving in detail into the technical and policy considerations that inform the EPA's choice of the SILs recommended in this document, it is important to point out that the discretion of the EPA and other permitting authorities is limited by the 2010 rulemaking. Specifically, since the EPA has established by regulation that a PM_{2.5} impact greater than a certain value will be considered to cause or contribute to a violation of the relevant NAAQS, permitting authorities may not use a value higher than 1.2 µg/m³ for the 24-hour PM_{2.5} NAAQS or a value higher than 0.3 µg/m³ for the annual PM_{2.5} NAAQS. Because ozone is not addressed in 40 CFR 51.165(b)(2), permitting authorities are not precluded from developing a higher ozone NAAQS SIL value than recommended in this guidance. Likewise, 40 CFR 51.165(b)(2) does not address PSD increments and, thus, does not constrain the discretion of a permitting authority to develop a higher SIL value and use it for PSD increment purposes.

³⁸ Efron, B. (1979); "Bootstrap methods: Another look at the jackknife". *The Annals of Statistics* 7 (1): 1–26. doi:10.1214/aos/1176344552.

³⁹ Efron, B. (2003); *Second Thoughts on the Bootstrap*. *Stat. Sci.*, 18, 135-140.

⁴⁰ The EPA conducted an external peer review of the technical document containing the statistical analysis used for developing the SILs for ozone and PM_{2.5}. The peer review comments were supportive of the air quality variability method as being appropriate for application for SILs. The comments also suggested several considerations for improvements to the technical document and analyses to better support the application of the analysis to determine specific SIL values. Therefore, the EPA made a number of revisions to the technical document, including conducting new analyses to investigate issues raised by the reviewers, edits to a number of sections for clarity and accuracy, and updating the analysis to include the most recent data. A peer review report that outlines the subsequent changes to the technical analysis is available from the U.S. EPA library, library number EPA 454/S-18-001.

Basis for Development of Recommended SILs for Ozone and PM_{2.5}

In developing the recommended SILs for ozone and PM_{2.5}, we assessed the variability in pollutant concentrations, as determined by the national monitoring network, from the design value at each monitor (i.e., baseline value). The technical analysis uses traditional statistical techniques based on statistical significance testing to characterize the variability in air quality. The conceptual underpinnings of the analysis are an application of the concept of “statistical significance” to inform a policy decision regarding what represents an insignificant impact and, therefore, may serve as the basis for developing a SIL for use in the air quality impact analyses required for PSD permitting. More specifically, traditional statistics is based on the concept of identifying what constitutes a statistically significant change from a baseline value where the “baseline” is the statistic of interest, such as the mean or, in this case, the design value. Rather than focusing on statistically significant changes, the purpose of the analysis was to calculate changes in the design values that, once precautionary choices are applied, may be considered not significant or meaningful. To identify recommended SILs for the desired application in the PSD program, the EPA determined that the findings of the statistical analysis can be used to identify a change in the design value (i.e., an air quality impact) below which a permitting authority may reasonably conclude that the impact does not cause or contribute to a violation of a NAAQS. The principles of statistical significance testing do not by themselves provide a single, unique threshold for determining the statistical significance of a change in the design value. Statistical significance testing provides a range of concentration values that can be considered to represent a statistically significant change in air quality or, in this application, a change in air quality that is not statistically significant. Therefore, it is necessary to consider the function and application of SIL values in the context of the PSD program and to select a change in air quality that is reasonably representative of the showing that a proposed source will not cause or contribute to a NAAQS violation, as required by the Act and PSD regulations.

In making a recommendation for an appropriate SIL value, the EPA balanced two considerations: 1) the usefulness of the SIL as a compliance demonstration tool in the PSD permitting program, and 2) the likelihood of a SIL value representing an impact that is not significant. In balancing these considerations, the EPA made policy decisions concerning the confidence interval (CI) to represent the inherent variability for purposes of the NAAQS compliance demonstration, the approach used to scale local variability to the level of the NAAQS, the geographic extent of each summary value, and the design value year or years from which to use the variability results. As described below, for each of these factors, the EPA chose options that are precautionary, leading to SILs designed to ensure the protection of air quality.

Through the statistical analysis, we calculated CIs, which represent different assessments of the level of change in air quality based on the inherent variability in the air quality of an area. We then selected the recommended SIL values as a function of the CIs, the baseline value, and policy considerations. The selection of a CI in defining a particular SIL value required an exercise of judgment based on the technical and policy considerations (as described below) such that the selected value represents a level of change in air quality concentration that can be considered not significant or meaningful in the context of evaluating the impact of emissions from a proposed

source. These policy considerations work in conjunction with the statistical analysis, to provide a rational basis to select values derived from the statistical analysis that can be applied as a tool for making the PSD compliance demonstration required by the Act and PSD regulations. For more information on the design and results of the technical analysis, please refer to the technical document.

The technical analysis relies upon data from the national ambient monitoring network for ozone and PM_{2.5}. Because these data generally are the basis for determining NAAQS attainment, they are an appropriate basis to characterize air quality, with the statistical analysis evaluating the variation in the design value at each monitoring site across the nation. This variability in air quality concentrations is described by the different CIs computed from the statistical analysis. The CIs identify a statistically significant deviation from the baseline value. As described in the technical document (Section 3.0), the EPA has calculated CIs at the 25 percent, 50 percent, 68 percent, 75 percent, and 95 percent intervals for consideration in defining SIL values for ozone and PM_{2.5}. The smallest CI that might be used to identify a statistically significant change would be a 68 percent CI, which corresponds to one standard deviation from the baseline value. Thus, any change in the design value larger than the variation represented by the 68 percent CI could be considered to be a statistically significant change. However, for purposes of the PSD program, we are seeking to identify a concentration value that constitutes an insignificant impact, meaning a change in the design value that does not reflect a meaningful difference in air quality based on the introduction of a new source. Thus, from a statistical perspective, the EPA believes that the CIs used in determining an appropriate SIL value should be below 68 percent, corresponding to a change of less than one standard deviation.

Very small SIL values would have limited use to permitting authorities (i.e., would lead to “false positives”), while larger values (closer to the air quality change represented by the 68 percent CI) would lead to “false negatives.” In weighing these competing considerations to select an appropriate SIL value, the EPA believes that air quality change represented by a 50 percent CI represents a protective approach for a SIL value because it is sufficiently within the 68 percent CI, while still being sufficiently higher than zero such that it can be a useful compliance demonstration tool for the PSD permitting process. Of the available choices, the 50 percent CI has more utility as a screening tool under the permitting program, while providing a value that adequately reflects a change in air quality concentrations that is not significant or meaningful.

The EPA chose to use the relative variability rather than the absolute variability in calculating the SILs because the technical analysis (Section 4.0) showed that the relative variability is fairly consistent across the range of design values, suggesting a commonality in the relative variability across a wide range of geographic regions, chemical regimes, and baseline air quality levels in the development of the SILs.

In order to promote national consistency, the EPA has historically provided national SIL values rather than regional or local values. The EPA considered whether a SIL value should be informed by the statistical analysis at the particular site of the proposed source or the central tendency across all monitored sites in the U.S., regardless of the proposed source’s planned location. The EPA

continues to recommend using a national SIL value based on the variability aggregated across the nation rather than developing regional or local values. Findings from the statistical analysis indicate that while there are local spatial correlations, there are few instances of large scale (e.g., region-to-region) trends in ambient air variability. Thus, national numbers are supported by the spatial analysis and suitable for use here. Because NAAQS and PSD increments are set on a national basis, the EPA and permitting authorities have historically used national SILs in the PSD program. National SIL values are designed to be used for any location subject to PSD requirements and eliminate the need to determine local or regional approaches for developing a SIL value, including addressing the status of local air quality monitoring (which would be needed if regional or local SILs were to be determined). However, as noted above, local permitting authorities have the discretion to develop alternate SILs.⁴¹ Having a national SIL value promotes consistency in implementation and prevents possible confusion or arbitrary choices that may arise with highly localized SIL values (i.e., determining which monitors to use for computations and other possible deviations from national protocol). Given these considerations, the EPA recommends continuing the practice of using national SIL values. Furthermore, as shown in the technical analysis (Section 4.0), because the median statistic is less influenced by high variability areas, the median statistic is preferred for use in selecting a SIL. Therefore, using the median statistic of the relative variability from the 50 percent CIs from the entire U.S. ambient monitoring network satisfies the policy needs for a SIL and is congruent with the physical and chemical processes that result in this variability.

Next, the EPA chose to use the most recently available years of ambient monitoring data (2012-2016) in the technical analysis to derive the recommended SILs. The SILs should reflect the most recent and representative state of the nation's atmosphere. In assessing the historical trends in ozone and PM_{2.5} air quality levels across the nation, there are observable downward trends in concentrations that indicate more recent data are most appropriate. To have more confidence that the resulting values would not be unduly influenced by temporary circumstances or episodic events, the EPA's recommended SILs are based on an average of the most recent three design value years as a basis for ozone and PM_{2.5} SIL development (i.e., 2012-2014, 2013-2015, 2014-2016).

⁴¹ In the cases where a permitting authority is considering an alternative SIL(s) due to the characteristics of regional variability (e.g., if, based on the analysis presented in the technical document, a specific area appears to have more localized variability than the national average), it is important to understand the factors driving that apparent variability to fully support the application of alternative SIL(s). For example, the results presented in section 4.3 of the technical document show some areas with regional variability for the 24-hour PM_{2.5} standard, though no regional trends were apparent for the annual PM_{2.5} standard and the ozone standard. Furthermore, these regional trends for the 24-hour PM_{2.5} standard were not apparent in the other data years shown in the appendix of the technical document. Additionally, the discussion in the technical document highlights potential causes for some of the variability in these regions (e.g., lower sampling frequency, that can lead to apparently higher variability than would otherwise be shown with higher sampling frequency). Similar issues are discussed in the technical document and can have important consequences for the results and conclusions drawn from more localized analyses of the ambient data and should be thoroughly vetted when considering alternative SILs.

SILs for NAAQS

Using the method described above, the EPA developed SIL values for the 8-hour ozone NAAQS and the annual and 24-hour PM_{2.5} NAAQS. Table 1 lists these SIL values for the NAAQS. Each of these SIL values is based on the level, averaging period and statistical form of its corresponding NAAQS. For the reasons discussed in this guidance and supporting documents, we recommend that PSD permitting authorities use the following values as SILs on a case-by-case basis in the manner described in the next section.

Table 1. Recommended SIL Values for Ozone and PM_{2.5} NAAQS

Criteria Pollutant (NAAQS level)	NAAQS SIL concentration
Ozone 8-hour (70 ppb)	1.0 ppb
PM _{2.5} 24-hour (35 µg/m ³)	1.2 µg/m ³ *
PM _{2.5} annual (12 µg/m ³ or 15 µg/m ³)	0.2 µg/m ³

* The table accounts for the significance level for the 24-hour PM_{2.5} NAAQS in 40 CFR 51.165(b)(2). Refer to the guidance discussion for details.

For the 8-hour ozone NAAQS, the SIL value we recommend is 1.0 part per billion (ppb). Consistent with the form of the NAAQS, this value is based on the annual 4th highest daily maximum 8-hour concentration, averaged over 3 years. The recommended SIL value for ozone is the same as the derived value from the air quality variability analysis.

For the 24-hour PM_{2.5} NAAQS, the SIL value we recommend is 1.2 µg/m³. The derived value from the air quality variability analysis is 1.5 µg/m³ and is based on an analysis of the 98th percentile 24-hour concentrations averaged over 3 years. However, 40 CFR 51.165(b)(2) still lists 1.2 µg/m³ as the significance level for the 24-hour PM_{2.5} NAAQS. In the 2010 rulemaking, the EPA determined that an impact above this value will be considered to cause or contribute to a violation of the 24-hour PM_{2.5} NAAQS at any location that does not meet this standard. In the same rule, the EPA also sought to establish that an impact below this value would not cause or contribute to a violation of this NAAQS but acknowledged that there could be circumstances where this conclusion was not always valid. Even though the ambient air quality variability approach indicates that an impact below 1.5 µg/m³ is not significant, significance levels for PM_{2.5} remain in the EPA's regulations at 40 CFR 51.165(b)(2) and the EPA is presently bound by its prior conclusion (that an impact above 1.2 µg/m³ is significant and will cause or contribute to a violation of the 24-hour PM_{2.5} NAAQS). Thus, the EPA cannot conclude at this time that an impact between 1.2 µg/m³ and 1.5 µg/m³ is an insignificant impact or an impact that will not cause or contribute to a violation of the NAAQS. However, based on the ambient air quality variability

approach, the EPA can conclude that impacts below $1.2 \mu\text{g}/\text{m}^3$ are insignificant at any location and will not cause or contribute to a violation of the NAAQS.⁴²

For the annual $\text{PM}_{2.5}$ NAAQS, we recommend $0.2 \mu\text{g}/\text{m}^3$ as the SIL value, which is the value based on a 3-year average of annual average concentrations. This value is lower than the value of $0.3 \mu\text{g}/\text{m}^3$ listed in 40 CFR 51.165(b)(2). Since 40 CFR 51.165(b)(2) does not address whether an impact below $0.3 \mu\text{g}/\text{m}^3$ causes or contributes to a violation of the NAAQS, the EPA and other permitting authorities retain the discretion under this provision to determine on a case-by-case basis whether an impact between $0.2 \mu\text{g}/\text{m}^3$ and $0.3 \mu\text{g}/\text{m}^3$ will cause or contribute to a violation of the annual $\text{PM}_{2.5}$ NAAQS. However, based on the ambient air quality variability approach, the EPA's judgment is that an impact below $0.2 \mu\text{g}/\text{m}^3$ is not significant and should be considered to not cause or contribute to any violation of the annual $\text{PM}_{2.5}$ NAAQS that is identified.

We recommend that these SIL values apply to the NAAQS everywhere, regardless of the class of the airshed.⁴³ For $\text{PM}_{2.5}$, this recommendation is different than what was provided in the vacated (k)(2) paragraphs, where the SIL value that would be used for NAAQS purposes was different for Class I areas than for Class II and III areas. The EPA recognizes that, historically, Congress has provided special protections to Class I areas, as described below in the discussion of SILs for PSD increments. The EPA believes that because each ozone and $\text{PM}_{2.5}$ NAAQS is uniform throughout the class areas, no class-specific protection via SILs is necessary when assessing whether a source causes or contributes to a violation of the NAAQS.

SILs for PSD Increments

There are no PSD increments established for ozone and, thus, no ozone SIL values are needed for PSD increment compliance purposes. We used the air quality variability approach to develop PSD increment SILs for the $\text{PM}_{2.5}$ PSD increments (*see* Table 2), but in an indirect way. The SIL values

⁴² 40 CFR 51.165(b)(2) provides that a source impact higher than one of the listed significance levels is to be considered significant. A source impact exactly equal to a significance level need not be considered significant. In contrast, in this guidance, consistent with past guidance, we are recommending that a value exactly equal to a recommended SIL be considered significant. Thus, these two approaches treat a value equal to the stated level differently. In practice, we do not expect this to be a practical difference because it will be very unusual for a source's impact to exactly equal one of the recommended SIL values.

⁴³ When Congress established the PSD program requirements under the 1977 Act Amendments, it included specific numerical PSD increment levels for SO_2 and particulate matter (expressed at that time as "total suspended particulate") for Class I, II and III areas. Congress designated Class I areas (including certain national parks and wilderness areas) as areas of special national concern, where the need to prevent deterioration of air quality is the greatest. Consequently, the PSD increments are the smallest in Class I areas. The PSD increments of Class II areas are larger than those of Class I areas and allow for a moderate degree of emissions growth. Class III areas have the largest PSD increments, but to date no Class III areas have been designated. The EPA subsequently defined Class I, II and III PSD increments for NO_2 and PM_{10} , and $\text{PM}_{2.5}$ in multiple rulemakings.

for the PM_{2.5} PSD increments are derived from the recommended NAAQS SIL values and reflect that, under the PSD regulations, the allowable PSD increment values are different for Class I, II and III areas. For Class II areas (which comprise most of the U.S.) and Class III areas (of which there are currently none), we recommend that the values of the NAAQS SILs also be used for PSD increment SILs. For Class I areas, we are recommending annual and 24-hour PSD increment SIL values that are lower than the NAAQS SIL values. This is because the EPA recognizes that Congress intended to establish special protection for Class I areas, as observed by the more stringent statutory Class I PSD increments, as well as provisions for use of air quality related values (including protection against visibility impairment).⁴⁴ To help reflect this additional protection, we applied the ratios of the Class I and Class II allowable PSD increments to the NAAQS SIL values derived in our technical analysis.⁴⁵ The EPA believes these values for Class I areas will continue to reflect this higher level of protection through the PSD increment SILs.

Table 2. Recommended SIL Values for PM_{2.5} PSD Increments

Criteria Pollutant (averaging period)	PSD increment SIL concentration		
	Class I	Class II	Class III
PM _{2.5} (24-hour)	0.27 µg/m ³	1.2 µg/m ³	1.2 µg/m ³
PM _{2.5} (annual)	0.05 µg/m ³	0.2 µg/m ³	0.2 µg/m ³

IV. APPLICATION OF SILS

The EPA recommends that permitting authorities consider using these SIL values for ozone and PM_{2.5} on a case-by-case basis at the same points in the PSD air quality analysis as SIL values historically have been used in the PSD program, as described below, with one exception regarding defining the spatial extent for modeling.

First, permitting authorities may elect to use the SIL values reflected in this guidance in a preliminary (single-source) analysis that considers only the impact of the proposed source in the permit application on air quality to determine whether a full (or cumulative) impact analysis is necessary before reaching a conclusion as to whether the proposed source would (or would not) cause or contribute to a violation.⁴⁶ A modeled result predicting that a proposed source's maximum impact will be below the corresponding SIL value recommended above generally may be considered to be a sufficient demonstration that the proposed source will not cause or contribute to a violation of the applicable NAAQS or PSD increment. If the single-source analysis shows that a proposed source will not have a significant impact on air quality, permitting authorities may

⁴⁴ Section 165(d)(2) of the Act sets forth procedures affording special protection against adverse air quality impacts in Class I areas. Also, section 169A of the Act declares a national goal of preventing future and remedying any existing impairment of visibility in Class I areas. 42 U.S.C. 7475 and 7491.

⁴⁵ To derive the Class I PSD increment SIL values, we started with the corresponding NAAQS SIL value as the base number and adjusted it by the ratio of the associated Class I and II PSD increments. For the annual PM_{2.5} increment, we reduced the NAAQS SIL value by the ratio of 1:4, because the Class I PSD increment is 1 µg/m³ and the Class II PSD increment is 4 µg/m³. We used the ratio of 2:9 for the 24-hour PM_{2.5} increment. For the 24-hour increment, we used the 40 CFR 51.165(b)(2) value of 1.2 µg/m³ as our base number.

⁴⁶ 1990 Draft NSR Workshop Manual at C.24-C.25, C.51.

generally conclude there is no need to conduct a cumulative impact analysis to assess whether there will be any violations of the NAAQS or PSD increment. However, upon considering the permit record in an individual case, if a permitting authority has a basis for concern that a demonstration that a proposed source's impact is below the relevant SIL value at all locations is not sufficient to demonstrate that the proposed source will not cause or contribute to a violation, then the permitting authority should require additional information from the permit applicant to make the required air quality impact demonstration.

Second, where the preliminary analysis described in the prior paragraph shows a significant impact, permitting authorities may choose to use the recommended SIL values in a cumulative impact analysis for a NAAQS, which, in addition to the proposed new major stationary source or major modification, includes the impact of existing sources (onsite with the proposed major modification, as well as other existing sources), and the appropriate background concentration. The EPA has described this application of a SIL as a "culpability analysis."⁴⁷ Where a cumulative impact analysis predicts a NAAQS violation, the permitting authority may further evaluate whether the proposed source will cause or contribute to the violation by comparing the proposed source's modeled contribution to that violation to the corresponding SIL value. If the modeled impact is below the recommended SIL value at the violating receptor during the violation, the EPA believes this will be sufficient in most cases for a permitting authority to conclude that the source does not cause or contribute to (is not culpable for) the predicted violation. This demonstration would, thus, allow the permit to be issued if all other PSD requirements are satisfied. If the proposed source's modeled impact is higher than or equal to the recommended SIL value at the violating receptor during a violation, then a permit should not be issued unless (1) further modifications are made to the proposed source to reduce the proposed source's impact to a not significant level at the affected receptor during the violation, or (2) the proposed source obtains sufficient emissions reductions from other sources to compensate for its contribution to the violation.⁴⁸

Third, permitting authorities may decide to use the SIL values recommended above in a cumulative impact analysis for a PSD increment. According to 40 CFR 51.166(c)(1) and 52.21(c), an allowable PSD increment based on an annual average may not be exceeded, and the allowable PSD increment for any other time period may be exceeded once per year at any one location. In either case, the PSD increment SILs recommended above may be used to determine if the proposed source will cause or contribute to that exceedance. If the cumulative impact analysis shows an annual average PM_{2.5} PSD increment exceedance or a 24-hour PSD increment exceedance at a location, then the comparison of the proposed source's impact at that location during the exceedance to the corresponding SIL value may be used to determine whether the proposed source will cause or contribute to the exceedance(s) at that receptor. If the modeled impact is below the SIL for the relevant pollutant, then the permitting authority may conclude that the source does not cause or contribute to a violation of the PSD increment for that pollutant.

⁴⁷ *Prairie State*, 13 E.A.D. at 100; *Mississippi Lime*, 15 E.A.D. at 374.

⁴⁸ 1990 Draft NSR Workshop Manual at C.52-C.53; this latter alternative is referred to as a PSD offset, and state implementation plans may include an offset program based on federal regulations at 40 CFR 51.165(b).

In the past, SILs have been used in defining the spatial extent of the modeling domain for a cumulative impact analysis. Because an impact from a proposed source below a SIL value is considered not to cause or contribute to a violation, the EPA has previously recognized that there was no informational value in placing modeling receptors farther from the proposed source than the most distant point at which the proposed source's impact is equal to or greater than the applicable SIL value. Streamlining the modeling demonstration to reduce the number of receptors to those of value in determining if the proposed source will cause or contribute to a violation of the applicable NAAQS or PSD increment has enabled permit applicants to complete the required modeling with a reasonable effort. As discussed earlier, the EPA recently updated its *Guideline*. The revisions include providing an appropriate, revised basis for determining the modeling domain for NAAQS and PSD increment assessments. Thus, the revised *Guideline* should be used when considering the extent of the modeling domain.

The SILs identified in this guidance should not influence Air Quality Related Values analyses in Class I areas, which are independent reviews by the Federal Land Managers during the application review process.

Subject to limitations described in this guidance, permitting authorities may use the values in the above tables on a case-by-case basis to support air quality analyses and demonstrations required for issuance of PSD permits. Since this guidance is neither a final determination nor a binding regulation, permitting authorities retain the discretion not to use SILs as described here, either in specific cases or programmatically.

The case-by-case use of SIL values should be justified in the record for each permit. To ensure an adequate record, any PSD permitting decision that is based on this guidance (including the technical and legal documents) should incorporate the information contained in them. The permitting authority should also consider any additional information in the record that is relevant to making the required demonstration.

Permitting authorities also retain the discretion to use other values that may be justified separately from this guidance as levels of insignificant impact, subject to one limitation for the PM_{2.5} NAAQS. Since the EPA has established by regulation that a PM_{2.5} impact greater than certain values will cause or contribute to a violation of the relevant NAAQS, permitting authorities may not use a value higher than 1.2 µg/m³ for the 24-hour PM_{2.5} NAAQS or a value higher than 0.3 µg/m³ for the annual PM_{2.5} NAAQS. Because the 2010 rulemaking constrains the discretion of state and local permitting authorities, the EPA is committed to reassessing 40 CFR 51.165(b)(2) through a future rulemaking process that will begin within 18 months.

Because ozone is not addressed in 40 CFR 51.165(b)(2), permitting authorities are not precluded from developing a higher ozone NAAQS SIL value than recommended in this guidance. Likewise, 40 CFR 51.165(b)(2) does not address PSD increments and, thus, does not constrain the discretion of a permitting authority to use a higher SIL value that a permitting authority may develop for PSD increment purposes. Permitting authorities are also not precluded from developing and using lower SIL values than recommended in this guidance. Permitting authorities may elect to utilize

alternative CIs, based on regional or local factors, in developing their own SIL values. The case-by-case use of a SIL value should be supported by a comparable record in each instance that shows that the value represents a level below which a proposed source does not cause or contribute to a violation of the NAAQS or PSD increment.

From: [Knight, Andrew, NMENV](#)
To: [Butt, Neal, NMENV](#)
Cc: [Baca, Michael, NMENV](#); [Singleton, Kerwin, NMENV](#)
Subject: FW: NMED Response to Comment
Date: Monday, June 7, 2021 1:56:38 PM
Attachments: [NMED Ex 11 WEG Stakeholder Comment and NMED Response.pdf](#)

Neal,
Here is the email to WEG, sent last Friday.

Andrew

From: Knight, Andrew, NMENV
Sent: Friday, June 4, 2021 1:59 PM
To: Daniel Timmons <dtimmons@wildearthguardians.org>
Subject: NMED Response to Comment

Daniel,
Please see the attached.

Thanks.

Please note new office phone number

Andrew P. Knight
Assistant General Counsel
New Mexico Environment Department
Office of General Counsel
121 Tijeras Ave NE
(Office) 505-470-8215 (Cell) 505-907-8836
Andrew.Knight@state.nm.us
www.env.nm.gov
Twitter: @NMEnvDep | #IamNMED

Mr. Timmons

Thank you for your interest in our rulemaking and your suggested comments. Please find each comment addressed below.

WEG Comment #1:

"First, I want to reiterate my concern regarding the public notice provided for this proceeding. In addition to not directly emailing the public notice to myself or Mr. Nykiel, despite our entries of appearance in this proceeding, the public notice was also not put up on the EIB's website in a timely manner. While I understand that the May 21 comment deadline is not a regulatory requirement, the rules do require public notice on the EIB's website at least 60 days prior to hearing. 20.1.1.301 NMAC (requiring 60 days public notice); 20.1.1.6.N NMAC [sic] (defining "provide to the public" as including posting on the Board's website and emailing to rulemaking participants). The Board's failure to meet this obligation does not simply affect Guardians, but the public at large. Accordingly, we believe it would be appropriate to extend the date of the hearing and provide supplemental notice as needed to meet the applicable requirements.

AQB response #1:

A notice of rulemaking hearing was sent to the Air Quality Bureau's Regulatory and SIP Bulletin list serve on March 30, 2021; and as shown by the attached distribution list, five members of WEG, including yourself, were sent notice. (dtimmons@wildearthguardians.org, jhorning@wildearthguardians.org, jnichols@wildearthguardians.org, mnykiel@wildearthguardians.org, rsobel@wildearthguardians.org,). In addition, you were present at the EIB meeting on March 26, 2021, where AQB requested and was granted a hearing date and time regarding EIB 21-07 (R).

The AQB does not review EIB actions to ensure that the EIB is in compliance with 20.1.1 NMAC - *Rulemaking Procedures - Environmental Improvement Board*; however, AQB has complied with Agency requirements for public notice and hearings contained in 20.1.1 NMAC - *Rulemaking Procedures - Environmental Improvement Board* 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).

The certification that AQB's NNSR rule is adequate, is due to EPA by August 3, 2021. Any delay in the hearing date will cause the AQB to miss this deadline.

The AQB opposes any postponement of this hearing.

WEG Comment #2:

"Second, regarding the substance of the rule, Guardians remains concerned that the amended language at 20.2.79.109 could be misinterpreted as excluding ozone from the "cause or contribute" analysis required by statute. As we discussed, because there is no significant ambient concentration established by rule, the rule could be read to imply that the cause or

contribute standard does not apply to ozone. The regulations, of course, require permit denial where a new facility will cause or contribute to any NAAQS exceedance, which includes ozone. 20.2.72.208.D NMAC. Our concern regarding the potential misinterpretation of the proposed language is exacerbated by the Board's recent decision indicating that the Department lacks the authority to deny minor source permits based on ozone impacts. EIB No. 20-21. I am attaching redline language that attempts to clarify that ozone is still subject to the cause or contribute standard, which should be evaluated on a case-by-case basis absent a regulatory significant ambient concentration. This approach comports both with the regulations as well as applicable EPA guidance regarding Significant Impact Levels for PM_{2.5} and ozone, which I am also attaching for your reference."

AQB Response #2:

AQB opposes the language proposed in your comment. Any proposed rule language that is at variance from language already approved into the SIP (i.e., 20.2.79 NMAC) must receive concurrence from EPA, or they will not approve the proposed SIP revision. Since your proposed text does not appear to be reflected by the Code of Federal Regulations, EPA is unlikely to approve it. The text proposed by AQB, while not verbatim, is derived from and aligns with 40 CFR 51.165.(b)(1) & (2). The AQB has worked with EPA on these revisions, and EPA has indicated that they are adequate. Since the language proposed by AQB mirrors the CFR, there should not be any misinterpretation of applicability or of whether a major source or major modification causes or contributes to the violation of the ozone NAAQS. In addition, the table of significant ambient concentrations at 20.2.79.119 NMAC is verbatim from 40 CFR 51.165.(b)(2), which also does not list a significance level for ozone. Further, the comment is not germane to the proposed amendments to 20.2.79 NMAC as the rule applies to major sources or major modifications only, not minor sources.

The April 17, 2018 EPA *Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program* is non-binding guidance and applies to the PSD permitting program (20.2.74 NMAC) and not the nonattainment permitting program (20.2.79 NMAC) per se.

The permitting rules that are currently in place are protective of air quality, including requirements for sources located within ozone attainment and nonattainment areas. When considering ozone impacts, major sources and major modifications (i.e., an increase of 40 TPY VOC or NO_x) in attainment, unclassifiable, or attainment/unclassifiable areas are subject to PSD permitting rules under 20.2.74 NMAC, *Permits - Prevention Of Significant Deterioration (PSD)*, and would require an ambient impact analysis (20.2.74.303 NMAC) using air quality modeling tools (20.2.74.305 NMAC). Due to the nature of ozone formation, EPA does not set a significant impact level for ozone (or for secondary PM_{2.5}). They have provided guidance that establishes a two-tiered screening approach for modeling to address impacts (i.e., *Guidance on the Development of Modeled Emission Rates for Precursors (MERPs) as a Tier 1 Demonstration Tool for Ozone and PM_{2.5} under the PSD Permitting Program*). Applicants and AQB's

permitting/modeling groups use this guidance on a case-by-case basis to determine impacts of a specific project. If it is determined that the project causes or contributes to the nonattainment violation, then the permit should be denied unless the permittee reduces their emissions to compensate for their impact. If their impact is on a designated nonattainment area (i.e., Sunland Park), the source would be subject to 20.2.79 NMAC, specifically Subsection 20.2.79.109.D NMAC:

D. "Other requirements.

(1) A new major stationary source or major modification which meets the criteria of Paragraph (2) of Subsection A of 20.2.79.109 NMAC shall demonstrate that the source or modification will not cause or contribute to a violation of any national ambient air quality standard by meeting the following requirements and no others of this part:

- (a) Paragraph (2) of Subsection C of 20.2.79.112 NMAC regarding emission offsets;
- (b) Subsection D of 20.2.79.112 NMAC regarding a net air quality benefit;
- (c) 20.2.79.114 NMAC - Emission Offset Baseline;
- (d) 20.2.79.115 NMAC - Emission Offset; and
- (e) 20.2.79.117 NMAC - Air Quality Benefit.

(2) In addition , a new source or modification which meets the criteria of Paragraph (2) of Subsection A of 20.2.79.109 NMAC and is also a major stationary source or major modification as defined in 20.2.74 NMAC (prevention of significant deterioration (PSD)), shall obtain a PSD permit under the provisions of 20.2.74 NMAC."

If the source's impact is on a designated attainment area, the source would not be subject to 20.2.79 NMAC.