

List of Subjects in 14 CFR Part 314

Administrative practice and procedure, Air transportation, Aviation safety, Hazardous materials transportation, Investigations, Law enforcement, Penalties.

■ Accordingly, under the authority of Section 199(a)(6) of the Workforce Investment Act of 1998, Public Law 105–220, 112 Stat. 1059, the Department of Transportation amends 14 CFR chapter 2 by removing part 314:

PART 314—[REMOVED AND RESERVED]

Issued in Washington, DC, on January 27, 2010.

Susan Kurland,

Assistant Secretary for Aviation and International Affairs.

[FR Doc. 2010–2281 Filed 2–3–10; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2009–0745; FRL–9110–2]

Approval and Promulgation of Implementation Plans; Albuquerque-Bernalillo County, NM; Excess Emissions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is approving revisions to the New Mexico State Implementation Plan (SIP) submitted by the Governor of New Mexico on behalf of the Albuquerque Environmental Health Department (AEHD) in a letter dated September 23, 2009 (the September 23, 2009 SIP submittal). The September 23, 2009 SIP submittal concerns revisions to New Mexico Administrative Code Title 20, Chapter 11, Part 49, Excess Emissions (20.11.49 NMAC—Excess Emissions) occurring during startup, shutdown, and malfunction related activities. We are approving the September 23, 2009 SIP submittal in accordance with the requirements of section 110 of the Clean Air Act (the Act).

DATES: This direct final rule will be effective April 5, 2010 without further notice unless EPA receives relevant adverse comments by March 8, 2010. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2008–0815, by one of the following methods:

- *Federal e-Rulemaking Portal:* <http://www.regulations.gov>.
- Follow the online instructions for submitting comments.
- *EPA Region 6 “Contact Us” Web site:* <http://epa.gov/region6/r6comment.htm>. Please click on “6PD (Multimedia)” and select “Air” before submitting comments.
- *E-mail:* Mr. Guy Donaldson at donaldson.guy@epa.gov. Please also send a copy by e-mail to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.
- *Fax:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), at fax number 214–665–7242.
- *Mail:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- *Hand or Courier Delivery:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays, and not on legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket No. EPA–R06–OAR–2008–0815. The EPA’s policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA

cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas. The State submittal is also available for public inspection during official business hours, by appointment, at the State Air Agency listed below during official business hours by appointment: AEHD, Air Quality Division, One Civic Plaza, Albuquerque, NM 87102.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–6691, fax (214) 665–7263, e-mail address shar.alan@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, “we,” “us,” and “our” refer to EPA.

Outline

- I. Background
 - A. What action are we taking in this document?
 - B. What documents did we use in our evaluation of the September 23, 2009 SIP submittal?
 - C. Why are we approving the September 23, 2009 SIP submittal?
- II. Final Action
- III. Statutory and Executive Order Reviews

I. Background

A. What actions are we taking in this document?

We are approving revisions to 20.11.49 NMAC—Excess Emissions occurring during startup, shutdown, and malfunction related activities as revisions to the New Mexico SIP for Albuquerque-Bernalillo County. We received this submittal with a September 23, 2009 letter from the Governor of New Mexico on behalf of the AEHD.

We are approving the repeal of the existing EPA-approved provisions of the New Mexico SIP for Albuquerque-Bernalillo County concerning excess emissions. The existing provisions were titled Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance. The existing provisions were approved into the New Mexico SIP for Albuquerque-Bernalillo County on April 10, 1980 (42 FR 24468) at 40 CFR 52.1620(c)(11). See Chapter A of our Technical Support Document (TSD) prepared in conjunction with this rulemaking action for more information.

The September 23, 2009 submittal included proposed revisions 20.11.65 NMAC—Volatile Organic Compounds to correct the Part 49-related cross-references, and was submitted as a revision to the New Mexico SIP for Albuquerque-Bernalillo County. We are approving the proposed revisions to 20.11.65 NMAC—Volatile Organic Compounds for Albuquerque-Bernalillo County. See Chapter C of our TSD prepared in conjunction with this rulemaking action for more information.

The September 23, 2009 submittal included proposed revisions to 20.11.90 NMAC—Source Surveillance, Administration and Enforcement to properly reflect repeal of the existing Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance provisions of the 20.11.90 NMAC. The revised 20.11.90 NMAC was submitted as revisions to the New Mexico SIP for Albuquerque-Bernalillo County. We are approving proposed revisions to 20.11.90 NMAC—Source Surveillance, Administration and Enforcement for Albuquerque-Bernalillo County. See Chapter E of our TSD prepared in conjunction with this rulemaking action for more information.

The September 23, 2009 submittal also included proposed revisions to NMAC 20.11.69—Pathological Waste Destructors. NMAC 20.11.69—Pathological Waste Destructors is not currently in the EPA-approved SIP for Albuquerque-Bernalillo County. We are not taking action on the proposed revisions to NMAC 20.11.69 as part of

today's rulemaking action. The revisions to NMAC 20.11.69 for Albuquerque-Bernalillo County will be handled in a separate rulemaking action.

B. What documents did we use in our evaluation of the September 23, 2009 SIP submittal?

The EPA's interpretation of the Act on excess emissions occurring during periods of startup, shutdown, and malfunction is set forth in the following documents: A memorandum dated September 28, 1982, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, entitled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (1982 Policy); EPA's clarification to the above policy memorandum dated February 15, 1983, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation (1983 Policy); EPA's policy memorandum reaffirming and supplementing the above policy, dated September 20, 1999, from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance and Robert Perciasepe, Assistant Administrator for Air and Radiation, entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (1999 Policy); EPA's final rule for Utah's sulfur dioxide control strategy (Kennecott Copper), April 27, 1977 (42 FR 21472); EPA's final rule for Idaho's sulfur dioxide control strategy, November 8, 1977 (42 FR 58171); and the latest clarification of EPA's policy issued on December 5, 2001 (2001 Policy). You can find the 2001 Policy at: <http://www.epa.gov/ttn/oarpg/t1pgm.html> (URL dating July 22, 2008). The EPA's interpretation of the Act related to exclusions from emission limitations for sources in certain startup, shutdown, or malfunction situations was upheld by the United States Court of Appeals for the Sixth Circuit in *Michigan Mfrs. Ass'n v. Browner*, 230 F.3d 181 (6th Cir. 2000).

C. Why are we approving the September 23, 2009 SIP submittal?

Under section 110(a) of the Act, EPA views all excess emissions as violations of the applicable emission limitation because excess emissions have the potential to interfere with attainment and maintenance of the National Ambient Air Quality Standards, or with the protection of Prevention of Significant Deterioration increments. However, EPA recognizes that imposition of a penalty for sudden and unavoidable malfunctions, startups or shutdowns caused by circumstances

entirely beyond the control of the owner or operator may not be appropriate. The EPA has provided guidance on two approaches for addressing excess emissions, the use of enforcement discretion and providing an affirmative defense to actions for civil penalties. Neither approach waives liability or reporting requirements for the violation. Excess emissions occurring during periods of startup, shutdown, maintenance, and malfunction must be included in determining compliance with SIP emission limitations. States are not required to provide an affirmative defense approach, but if they choose to do so, EPA will evaluate the State's SIP rules for consistency with our policy and guidance documents listed in section B of this document. Our reasons for approval of the September 23, 2009 SIP submittal are as follows:

The AEHD's September 23, 2009 SIP submittal adopts an affirmative defense approach to address excess emissions. This approach is permissible under the 1999 Policy.

The AEHD's September 23, 2009 SIP submittal clearly states that operation resulting in an excess emission is a violation of the air quality regulation or permit, and may be subject to potential enforcement action. This statement is consistent with the 1999 Policy.

The AEHD's September 23, 2009 SIP submittal adequately sets forth notification and reporting requirements for the owner or operator of a source having an excess emission. We believe that notification and reporting, including implementation of corrective action(s) when needed, of excess emissions will assist with the management of excess emissions and will enhance the New Mexico SIP for Albuquerque-Bernalillo County by reducing the amount or frequency of future potential excess emissions.

The AEHD's September 23, 2009 SIP submittal contains criteria to be considered when asserting an affirmative defense for an excess emission during startup or shutdown to claims for a civil penalty (but not the injunctive relief) that are similar, if not identical, to those in the 1999 Policy. We believe the criteria for asserting an affirmative defense are consistent with our guidance documents and should be approved. See 20.11.49.16(B) NMAC for these criteria.

The AEHD's September 23, 2009 SIP submittal contains criteria to be considered when asserting affirmative defense for an excess emission during a malfunction to claims for a civil penalty (but not the injunctive relief) that are similar, if not identical, to those in the 1999 Policy. We believe the criteria for

asserting an affirmative defense are consistent with our guidance documents and should be approved. See

20.11.49.16(A) NMAC for these criteria.

The AEHD's September 23, 2009 SIP submittal clearly states that AEHD's determinations concerning an owner or operator's assertion of the affirmative defense shall not preclude EPA or citizens' enforcement authority under the Act. This statement is consistent with 42 U.S.C. 7413 and 7604.

Section 20.11.49.16 NMAC of the AEHD's September 23, 2009 SIP submittal does not make affirmative defense available to an owner or operator of a source having an excess emission due to maintenance related activities. We believe that maintenance activities are predictable events that are subject to planning to minimize releases, unlike malfunctions or upsets, which are sudden, unavoidable or beyond the control of owner or operator. The owner or operator of a source should be able to plan maintenance that might otherwise lead to excess emissions to coincide with maintenance of production equipment or other facility shutdowns. This position is consistent with EPA's interpretation of section 110 of the Act, and with our guidance documents.

The AEHD's September 23, 2009 SIP submittal narrowly defines an emergency situation. An owner and operator may assert an affirmative defense for an emergency if certain criteria are met. See 20.11.49.16(C) NMAC for these criteria. In any enforcement proceeding, the owner or operator seeking to establish the occurrence of an emergency has the burden of proof. In addition, AEHD may require additional information reported within the time period specified by the department. See 20.11.49.16 NMAC. We believe this approach is consistent with our guidance documents.

Section 20.11.49.16 NMAC of the AEHD's September 23, 2009 SIP submittal prohibits availability of affirmative defense to an owner or operator of a source having an excess emission when exceeding federally-promulgated emissions limits, to an action for an injunctive relief, or when exceeding certain federally-approved SIP limits which were established by taking into account potential startup and shutdown emissions. See 20.11.49.16(D) NMAC. This requirement is consistent with our guidance documents.

For a section-by-section evaluation of the September 23, 2009 SIP submittal see Chapter B of our TSD. For these reasons we are approving 20.11.49

NMAC into New Mexico SIP for Albuquerque-Bernalillo County.

In addition, we are approving the repeal and replacement of the existing EPA-approved provisions of the New Mexico SIP for Albuquerque-Bernalillo County concerning excess emissions titled Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance. The existing EPA-approved provisions allowed affirmative defense for maintenance activities, and stated that excess emissions from such activities are not violations. The existing EPA-approved provisions did not conform with the 1999 Policy. The revised 20.11.49 NMAC contained in the September 23, 2009 SIP submittal conforms with the 1999 Policy, and its approval will enhance the New Mexico SIP for Albuquerque-Bernalillo County. As such this repeal and replacement meets and complies with section 110(l) of the Act. See Chapter A of our TSD.

II. Final Action

Today, we are approving revisions to New Mexico Administrative Code Title 20, Chapter 11, Part 49 Excess Emissions (20.11.49 NMAC—Excess Emissions), 20.11.65 NMAC—Volatile Organic Compounds, and 20.11.90 NMAC—Source Surveillance, Administration and Enforcement into New Mexico SIP for Albuquerque-Bernalillo County. We are approving the repeal of the existing excess emissions provisions titled Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance. We are not taking action on revisions to 20.11.69 NMAC—Pathological Waste Destructors for Albuquerque-Bernalillo County.

III. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions

of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act;
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994);

- Does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law; and

- Is not a "major rule" as defined by 5 U.S.C. 804(2) under the Congressional Review Act, 5 U.S.C. 801 *et seq.*, added by the Small Business Regulatory Enforcement Fairness Act of 1996. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule." Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 5, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2) of the Act.)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen oxide, Reporting and recordkeeping requirements, Ozone, Volatile organic compounds.

Dated: January 25, 2010.

Al Armendariz,

Regional Administrator, Region 6.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart GG—New Mexico

■ 2. The second table in § 52.1620(c) entitled “EPA Approved Albuquerque/Bernalillo County, NM Regulations” is amended by:

■ a. Adding a new entry for “Part 49 (20.11.49 NMAC) Excess Emissions” in numerical order by part number;

■ b. Revising the existing entry for “Part 65 (20.11.65 NMAC) Volatile Organic Compounds”; and

■ c. Revising the existing entry for “Part 90 (20.11.90 NMAC) Administration, Enforcement, and Inspection”.

The additions and revisions read as follows:

§ 52.1620 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED ALBUQUERQUE/BERNALILLO COUNTY, NM REGULATIONS

State citation	Title/subject	State approval/ submittal date	EPA approval date	Explanation
Albuquerque/Bernalillo County, Air Quality Control Regulations				
*	*	*	*	*
New Mexico Administrative Code (NMAC) Title 20—Environment Protection, Chapter 11—Albuquerque/Bernalillo County Air Quality Control Board				
*	*	*	*	*
Part 49 (20.11.49 NMAC) ...	Excess Emissions	9/23/09	2/4/10 [Insert <i>FR</i> page number where document begins].	
*	*	*	*	*
Part 65 (20.11.65 NMAC) ...	Volatile Organic Compounds ..	9/23/09	2/4/10 [Insert <i>FR</i> page number where document begins].	
*	*	*	*	*
Part 90 (20.11.90 NMAC) ...	Source Surveillance, Administration and Enforcement.	9/23/09	2/4/10 [Insert <i>FR</i> page number where document begins].	
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[FR Doc. 2010–2393 Filed 2–3–10; 8:45 am]

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