



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R06-OAR-2014-0642; FRL-9943-43--Region 6]

### **Approval and Promulgation of Air Quality Implementation Plans; New Mexico; and Albuquerque/Bernalillo County; Revisions to Establish Small Business Stationary Source Technical and Environmental Compliance Assistance Programs**

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

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving revisions to the New Mexico State Implementation Plan (SIP) for both the State and Albuquerque/Bernalillo County. These revisions establish Small Business Stationary Source Technical and Environmental Compliance Assistance Programs. The EPA is approving these revisions pursuant to section 110 and section 507(a) of the Clean Air Act (CAA).

**DATES:** This rule is effective on [insert date 60 days after date of publication in the Federal Register] without further notice unless EPA receives relevant adverse comments by [insert date 30 days after date of publication in the Federal Register]. If EPA receives such comments, EPA will publish a timely withdrawal 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-2014-0642, at <http://www.regulations.gov> or via email to [walser.john@epa.gov](mailto:walser.john@epa.gov). Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information

(CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact John Walser, 214-665-7128, [walser.john@epa.gov](mailto:walser.john@epa.gov). For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

*Docket:* All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index and in hard copy at EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

**FOR FURTHER INFORMATION CONTACT:** Mr. John Walser (6PD-L), (214) 665-7128, [walser.john@epa.gov](mailto:walser.john@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document, “we,” “us,” and “our” means EPA.

## **Table of Contents**

### **I. Background**

#### **A. What is a SIP?**

#### **B. Small Business Assistance Program (SBAP)**

### **II. Overview of the November 5 and November 16, 1992 State Submittals**

- A. New Mexico
- B. Albuquerque
- C. General

### III. Plan Requirements and Our Evaluation

- A. Small Business Assistance Program
- B. Ombudsman
- C. Compliance Assistance Panel (CAP)
- D. Eligibility
- E. Section 110(l)

### IV. Final Action

### V. Statutory and Executive Order Reviews

## **I. Background**

### **A. What is a SIP?**

Section 110 of the CAA requires states to develop air pollution regulations and control strategies to ensure that air quality meets the National Ambient Air Quality Standards (NAAQS) established by EPA. The NAAQS are established under section 109 of the CAA and currently address six criteria pollutants: carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide. A SIP is a set of air pollution regulations, control strategies, other means or techniques, and technical analyses developed by the state, to ensure that air quality in the state meets the NAAQS. It is required by section 110 and other provisions of the CAA. A SIP protects air quality primarily by addressing air pollution at its point of origin. SIPs can be extensive, containing state regulations or other enforceable documents, and supporting

information such as city and county ordinances, monitoring networks, and modeling demonstrations. Each state must submit any SIP revision to EPA for approval and incorporation into the federally-enforceable SIP.

The New Mexico SIP includes a variety of control strategies, including the regulations that outline general provisions applicable to and implemented by the Albuquerque/Bernalillo County Air Quality Control Board (AQCB).

### **B. Small Business Assistance Program**

Implementation of the provisions of the CAA, as amended in 1990, requires regulation of many small businesses so that areas may attain and maintain the national ambient air quality standards (NAAQS) and reduce the emissions of air toxics. Small businesses frequently lack the technical expertise and financial resources necessary to evaluate state regulations and to determine the appropriate mechanisms for compliance. Congress anticipated the impact of these requirements on small businesses and, accordingly, required in CAA section 507 that each state submit a SIP revision with plans for establishing a Small Business Stationary Source Technical and Environmental Compliance Assistance Program (Program). A key Program requirement outlined in CAA section 507(a), is the establishment of a Small Business Assistance Program (SBAP) to provide technical and compliance assistance to small businesses. In January 1992, the EPA issued “Guidelines for the Implementation of Section 507 of the 1990 Clean Air Act Amendments,” in order to delineate the Federal and State roles in meeting the new statutory provisions, and as a tool to provide further guidance to states on submitting acceptable SIP revisions. That guidance described the SBAP as the “core” of a state’s Program, because the SBAP is, “where the actual assistance to small businesses occurs.”<sup>1</sup>

---

<sup>1</sup> U.S. EPA, “Guidelines for the Implementation of Section 507 of the 1990 Clean Air Act Amendments” (January 1992) at vii.

## **II. Overview of the November 5 and November 16, 1992 State Submittals**

### **A. New Mexico**

On November 5, 1992, the Governor of New Mexico submitted revisions to the New Mexico SIP to establish the Program. The submittal was adopted by the Environmental Improvement Board (EIB) on October 9, 1992, consistent with the public notice requirements of CAA section 110(l). The revisions established a Program for the State of New Mexico, excluding Albuquerque/Bernalillo County.

The November 5, 1992 revisions to the SIP were in the form of a narrative commitment for full implementation of the Program by November 15, 1994 and a commitment to coincide with the effective date of the State's operating permit program. The Ombudsman (Director of Strategic Initiatives and Special Projects) is located in the Office of the NMED Secretary and was appointed before November 15, 1994, to represent the interests of small businesses, as they relate to the implementation of Section 507(a)(3) of the CAA.

In addition to designating a State Ombudsman to satisfy CAA section 507(a)(3), the State submitted its plans for the creation of a state SBAP. The State explained that the technical component of the SBAP would consist of state technical experts who would respond to requests for assistance from small businesses. The state explained that these technical staff would be located in the Air Quality Bureau's Planning Section, and would respond to permitting and compliance questions. As part of the SBAP, New Mexico's submission detailed the adequate mechanisms and procedures that would satisfy the remaining requirements of CAA section 507(a)(1)-(2), (4)-(7).

## **B. Albuquerque**

On November 16, 1992, The Governor of New Mexico submitted revisions to the New Mexico SIP for Albuquerque/Bernalillo County. The submittal was adopted by the Air Quality Control Board on October 7, 1992, consistent with the public notice requirements of CAA section 110(*J*). The revisions establish the Small Business Stationary Source Technical and Environmental Compliance Program for Albuquerque/Bernalillo County.

The November 16, 1992 revisions to the SIP were in the form of a narrative commitment for full implementation of the SBAP by November 15, 1994 and a commitment to coincide with the effective date of the State's operating permit program. The Small Business Ombudsman is in the office of the Albuquerque Environmental Health Director (AEHD). The establishment of a SBAP for providing technical and compliance assistance to small businesses was committed to be in the AEHD Air Pollution Control Division's Planning Section to give small businesses correct technical, permitting and compliance information for all applicable CAA requirements.

## **C. General**

In an August 28, 2015 letter, the State of New Mexico withdrew the elements of the 1992 SIP pertaining to the Compliance Assistance Panel (CAP), a requirement of CAA section 507(e) that EPA has historically viewed as a required component of the Program. Since the New Mexico legislature created one CAP for both the State and Albuquerque/Bernalillo County, the withdrawal, therefore, applies to both the State and Albuquerque/Bernalillo County.<sup>2</sup>

---

<sup>2</sup> August 28, 2015 Letter from Ryan Flynn, Secretary, State of New Mexico Environment Department, to Ron Curry, Regional Administrator for EPA Region 6, to withdraw the CAP from the 1992 SIP submittal.

Through an administrative oversight, these SIP revisions were not acted upon when submitted. EPA is now moving forward to take action on these revisions as part of our national SIP backlog reduction efforts.

### **III. Plan Requirements and Our Evaluation**

Section 507 of the CAA describes three broad sets of requirements: (1) The establishment of a Small Business Assistance Program (SBAP) to provide technical and compliance assistance to small businesses; (2) the establishment of a State Small Business Ombudsman to represent the interests of small business in the regulatory process; and (3) the creation of a Compliance Advisory Panel (CAP) “on the State level” to determine and report on the overall effectiveness of the SBAP.

#### **A. Small Business Assistance Program**

The overarching purpose of establishing an SBAP is to provide technical and compliance assistance to small businesses. As interpreted by EPA, CAA section 507(a) sets forth six requirements which must be met by the State in order to have an approvable SBAP.<sup>3</sup> The first SBAP requirement is for the State to establish adequate mechanisms for developing, collecting and coordinating information concerning compliance methods and technologies for small business stationary sources, and programs to encourage lawful cooperation among such sources and other persons to further compliance with the CAA.<sup>4</sup>

The second SBAP requirement is that the State establish adequate mechanisms for assisting small business stationary sources with pollution prevention and accidental release

---

<sup>3</sup> Notably, section 507(a) sets forth seven requirements, in subsections (1)–(7). The third of these, section 507(a)(3), requires the establishment of an Ombudsman Office—a key Program element. The Ombudsman requirement of section 507(a)(3) is discussed in the next section.

<sup>4</sup> See CAA section 507(a)(1).

detection and prevention, including providing information concerning alternative technologies, process changes, products and methods of operation that help reduce air pollution.<sup>5</sup>

The third SBAP requirement is to develop a compliance and technical assistance program for small business stationary sources which assists small businesses in determining applicable requirements and in receiving permits under the Act in a timely and efficient manner.<sup>6</sup>

The fourth SBAP requirement is to develop adequate mechanisms to assure that small business stationary sources receive notice of their rights under the CAA in such manner and form as to assure reasonably adequate time for such sources to evaluate compliance methods or final regulation or standards issued under the Act.<sup>7</sup>

The fifth SBAP requirement is to develop adequate mechanisms for informing small business stationary sources of their obligation under the CAA, including mechanisms for referring such sources to qualified auditors or, at the option of the State, for providing audits of operations of such sources to determine compliance with the CAA.<sup>8</sup>

The sixth SBAP requirement is to develop procedures for consideration of requests from a small business stationary source for modification of: (A) Any work practice or technological method of compliance; or (B) the schedule of milestones for implementing such work practice or method of compliance preceding any applicable compliance date based on the technological and financial capability of any such small business stationary source.<sup>9</sup>

The SIP narratives for both the State and Albuquerque/Bernalillo County discuss how their respective SBAPs meet the above requirements, and include further information about how each entity expects to implement and maintain their Programs. Further explanation of our

---

<sup>5</sup> See *id.* section 507(a)(2).

<sup>6</sup> See *id.* section 507(a)(4).

<sup>7</sup> See *id.* section 507(a)(5).

<sup>8</sup> See *id.* section 507(a)(6).

<sup>9</sup> See *id.* section 507(a)(7).

analysis of the adequacy of the submissions with respect to the SBAP requirements can be found in the TSD for this action.

### **B. Ombudsman**

Section 507(a) also requires states to establish a State Small Business Ombudsman to represent the interests of small businesses in the regulatory process. CAA section 507(a)(3) requires the designation of a State office to serve as the Ombudsman for small business stationary sources. The State has met this requirement by appointing an Ombudsman in the Office of the NMED Secretary in 1992. Albuquerque/Bernalillo County met this requirement by committing to appoint an Ombudsman in the Office of the Albuquerque Environmental Health Department before the November 15, 1994 statutory deadline.

### **C. Compliance Advisory Panel (CAP)**

In addition to the SBAP and Ombudsman, CAA section 507 envisions the creation of a Compliance Advisory Panel (CAP) “on the State level” to, among other things, evaluate and report on the overall effectiveness of the SBAP.<sup>10</sup> Congress narrowly prescribed the membership of the CAP, including which state officials would be responsible for appointing members representing various interests.<sup>11</sup> At the time of the submittal in 1992, the New Mexico program included a statewide CAP that met these stringent requirements, and which New Mexico believed was a required Program element because of EPA’s 1992 Program Guidance. Since that time, however, and after having a CAP in place for over 10 years, the State did not continue to operate a CAP. As mentioned previously, the State withdrew the portions of its SIP submission regarding the CAP in a letter dated August 28, 2015, a copy of which may be found in the docket for this action.

---

<sup>10</sup> See *id.* section 507(e)(1).

<sup>11</sup> See *id.* section 507(e)(2).

Although EPA has historically viewed the CAP as a necessary component of a Program, the Agency no longer believes that to be the case. In CAA section 507(a), Congress directed that EPA “shall approve” a Program if it meets the criteria outlined in section 507(a)(1)-(7). The requirement for the creation of a CAP, located in section 507(e), is not one of those criteria. This distinguishes the CAP from the requirements to designate a state office to serve as Ombudsman or to establish an SBAP, which are criteria for Program approval in CAA section 507(a).

Although a State may submit a CAP for inclusion as a component of its Program—and indeed, EPA still believes that CAPs serve an important role in the continued operational success of a Program—Congress, in locating the CAP requirement in section 507(e), envisioned that the requirement to create a CAP would be severable from the Program requirements outlined in section 507(a). Accordingly, New Mexico’s withdrawal of the CAP portion of its SIP submission does not prevent EPA from acting on the remainder of the submission. EPA believes that New Mexico, including Albuquerque/Bernalillo County, continues to operate a robust SBAP providing the required services to eligible small businesses.

Before taking an action that, as here, differs from past guidance or practice, EPA’s internal practices direct Regional Offices to follow a SIP consistency process to ensure consistency in across regional actions. The SIP consistency process was established in 1995 as part of the delegation to Regional Administrators of SIPs and SIP revision approval/disapprovals actions.<sup>12</sup>

Pursuant to 40 CFR 56.6(b) and the SIP consistency guidelines, EPA Region 6 followed this process. Pursuant to the SIP consistency process, EPA Region 6 consulted with all other

---

<sup>12</sup> See Memorandum from William L. Wehrum, Acting Assistant Administrator, to Air Division Directors, Regions I – X (September 7, 2005) (outlining the process). A copy of that memorandum is included in the docket.

EPA regional offices, the Office of Air and Radiation, and the Office of General Counsel. Region 6 received no objections to this shift in approach.

EPA is approving the New Mexico and Albuquerque Small Business Assistance Programs as revised with the withdrawal of the element relating to the CAP. Approval in the SIP will support state and local efforts to maintain their respective Programs.

#### **D. Eligibility**

While not a required Program element, it is also important that the SIP establishes criteria and procedures for determining the eligibility of a source to receive assistance under the Program. Section 507(c)(1) of the CAA defines the term “small business stationary source” as a stationary source that:

- a) Is owned or operated by a person who employs 100 or fewer individuals;
- b) Is a small business concern as defined in the Small Business Act;
- c) Is not a major stationary source;
- d) Does not emit 50 tons per year (tpy) or more of any regulated pollutant; and
- e) Emits less than 75 tpy of all regulated pollutants.

The State of New Mexico has established a mechanism for ascertaining the eligibility of a source to receive assistance under the Program, including an evaluation of a source’s eligibility using the criteria in section 507(c)(1) of the CAA. This mechanism is described in the state’s narrative SIP revision.

The State has also provided for exclusion from the small business stationary source definition, after consultation with the EPA and the Small Business Administration Administrator and after providing notice and opportunity for public hearing, of any category or subcategory of

sources that the State determines to have sufficient technical and financial capabilities to meet the requirements of the CAA.

#### **E. Section 110(l)**

Section 110(l) of the Act provides that a SIP revision must be adopted by a State after reasonable notice and public hearing. The submitted revisions address the City of Albuquerque/Bernalillo County and the State of New Mexico's Small Business Assistance Programs, as discussed in Section II of this preamble. Additionally, CAA section 110(l) states that the EPA cannot approve a SIP revision if that revision would interfere with any applicable requirement regarding attainment, reasonable further progress (RFP) or any requirement established in the CAA. The revisions do not interfere with any applicable requirement. To the contrary, they enhance the current SIP by providing for technical and compliance assistance for small businesses.

#### **IV. Final Action**

Pursuant to sections 110 and 507 of the Act, EPA is approving through a direct final action, revisions to the New Mexico SIP that were submitted on November 5, 1992 and November 16, 1992. We evaluated the state's submittals and determined that they meet the applicable requirements of the CAA section 507(a). Also, in accordance with CAA section 110(l), the proposed revisions will not interfere with attainment of the NAAQS, reasonable further progress, or any other applicable requirement of the CAA. Finally, this approval is in accordance with 40 CFR 56.6(b) and our SIP consistency guidelines. These revisions do not apply to Indian lands over which the State or the AQCB lacks jurisdiction.

EPA is publishing this rule without prior proposal because we view these as non-controversial amendments and anticipate no adverse comments. However, in the proposed rules

section of this Federal Register publication, we are publishing a separate document that will serve as the proposal to approve the SIP revision if relevant adverse comments are received. This rule will be effective on **[insert date 60 days after publication in the Federal Register]** without further notice unless we receive relevant adverse comments by **[insert date 30 days after publication in the Federal Register]**. If we receive relevant adverse comments, we will publish a timely withdrawal of this direct final rulemaking in the Federal Register informing the public that the direct final rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so now. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

## **V. Statutory and Executive Order Reviews**

Under the CAA, 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 CAA. 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 Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

- 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 (Public Law 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 CAA; and
- 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).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175

(65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

**List of Subjects in 40 CFR Part 52**

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

Dated: February 24, 2016.

**Ron Curry,**

*Regional Administrator, Region 6.*

40 CFR part 52 is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

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

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

**Subpart GG – New Mexico**

2. In §52.1620(e), the second table in paragraph (e), entitled “ EPA-Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the New Mexico SIP” is amended by adding two new entries at the end of the table to read as follows:

**§ 52.1620 Identification of plan.**

\* \* \* \* \*

(e) \* \* \*

**EPA-APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE NEW MEXICO SIP**

Name of SIP Revision	Applicable geographic of nonattainment area	State submittal/ effective date	EPA approval date	Explanation
* * * * *				
Small Business Stationary Source Technical and Environmental Compliance Assistance Program	Statewide, excluding Bernalillo County	11/05/1992	<u>[Insert the date of publication in the Federal Register].</u> <u>[Insert Federal Register Citation]</u>	
Small Business Stationary Source Technical and Environmental Compliance Assistance Program	Albuquerque/ Bernalillo County	11/16/1992	<u>[Insert the date of publication in the Federal Register].</u> <u>[Insert Federal Register Citation]</u>	