

Annual total parcel select postage	\$5M	\$25M	\$50M	\$100M	\$300M	\$500M
Rebate on DDU Volume	0.25%	0.50%	0.75%	1.00%	1.25%	1.50%

2.2.5 Growth Rebates

Beginning June 1, 2009, and each June 1 thereafter, shippers who qualify for a Loyalty Rebate and who increase their Parcel Select volumes in the most recent twelve-month (June 1–May 31) period (compared with the previous twelve-month period) by more than 10 percent will qualify for a Growth Rebate. (Shippers who had zero Parcel Select

volume in the previous twelve-month period will not be eligible for a Growth Rebate.) For shippers meeting all of the eligibility criteria, the percentage level of the Growth Rebate is based on their growth percentage and their total Parcel Select revenue in the twelve-month period, as shown in Exhibit 2.2.5. The Growth Rebate is applied only to qualified incremental DDU volume. The

Growth Rebate amount will be calculated by multiplying the difference between the previous twelve-month DDU volume and the most recent twelve-month DDU volume by the average postage per DDU piece over the current twelve-month period, times the applicable percentage shown in Exhibit 2.2.5.

Exhibit 2.2.5 Growth Rebate

Total parcel select postage to qualify	>\$5M (percent)	>\$25M (percent)	>\$50M (percent)	>\$100M (percent)	>\$300M (percent)	>\$500M (percent)
Total parcel select annual growth rate (percent)	Rebate on qualified incremental DDU volume					
>10	2	4	6	8	10	10
>20	4	6	8	10	12	12
>30	6	8	10	12	14	14

At the discretion of the USPS, volumes from the following 3-digit ZIP Codes may be exempt from the Growth Rebates due to delivery conditions: 100–102, 104, 107, 108, 111–113. Growth Rebates may not apply to volume growth as a result of mergers or acquisitions. Exclusions will be administered on a case-by-case basis.

500 Additional Services

* * * * *

507 Mailer Services

* * * * *

13.0 Parcel Return Service

* * * * *

[Revise heading by replacing “Rates” with “Prices”]

13.3 Prices

13.3.1 Parcel Return Service—Return Delivery Unit

[Revise text in 3.1 as follows:] Return Delivery Unit parcel prices are based on weight as identified in Exhibit 13.3.2 and 13.3.3. Parcels that measure more than 108 inches but not more than 130 inches in combined length and girth must pay the oversized price. RDU postage will be determined by the average weight of pieces retrieved from the RBMC or through a reverse manifest service agreement.

[Revise the heading of Exhibit 13.3.2 to read as follows:]

Exhibit 13.3.2 Parcel Return Service—Return Machinable

[Insert chart]

[Revise the heading of Exhibit 13.3.3 to read as follows:]

Exhibit 13.3.3 Parcel Return Service—Nonmachinable

[Insert chart]
* * * * *

700 Special Standards
703 Nonprofit Standard Mail and Other Unique Eligibility

* * * * *

2.0 Overseas Military Mail

2.1 Basic Standards

* * * * *

2.1.2 APO/FPO Priority Mail Flat-Rate Boxes

[Revise text by adding reference to commercial prices at the end of the second paragraph.]

* * * See Exhibit 1.2b, Priority Mail Prices—Commercial, for the commercial base price.

We will publish an appropriate amendment to 39 CFR 111.3.

Neva R. Watson,
Attorney, Legislative.
[FR Doc. E8–8210 Filed 4–15–08; 8:45 am]
BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 52

[EPA–R09–OAR–2007–0165; FRL–8543–6]

Approval and Promulgation of Implementation Plans; Revisions to the Nevada State Implementation Plan; Stationary Source Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve certain revisions to the applicable state implementation plan for the State of Nevada and to disapprove certain other revisions. These revisions involve State rules governing applications for, and issuance of, permits for stationary sources, but not including review and permitting of major sources and major modifications under parts C and D of title I of the Clean Air Act. These revisions involve submittal of certain new or amended State rules and requests by the State for rescission of certain existing rules from the state implementation plan. EPA is taking this action under the Clean Air Act obligation to take action on State submittals of revisions to state implementation plans. The intended effect is to update the applicable state implementation plan with current State rules with respect to permitting, where consistent with the Clean Air Act.

DATES: Effective Date: This rule is effective on May 16, 2008.

ADDRESSES: EPA has established docket number EPA-R09-OAR-2007-0165 for this action. The index to the docket is available electronically at <http://www.regulations.gov> and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. 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 in either location (e.g., Confidential Business Information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region IX, (415) 972-3534, yannayon.laura@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, the terms “we,” “us,” and “our” refer to EPA.

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I. Proposed Action

On April 17, 2007 (72 FR 19144), EPA proposed several actions in connection with certain revisions to the Nevada State Implementation Plan (SIP) submitted by the Nevada Division of Environmental Protection (NDEP) under the Clean Air Act (CAA or “Act”). Our April 17, 2007 proposal covers the State

rules that were included in NDEP's January 12, 2006 and December 8, 2006 SIP revision submittals and that govern applications for, and issuance of, permits for stationary sources. We also proposed action on the State's requests for rescission of certain permit-related rules in the existing SIP.¹ Tables 1, 2, and 3 below list the relevant submitted rules and rescission requests covered by our April 17, 2007 proposed rule.

Table 1 lists the submitted rules that, while related to permitting, are separable from the rest of the permitting-related rules and thus qualify for action independent of our action on the bulk of the permitting-related rules. Table 2 lists the submitted set of rules that comprise the bulk of NDEP's stationary source permitting program (excluding review under parts C and D of the title I of the CAA). Table 3 lists the permitting-related rules (in the existing SIP) for which NDEP has requested rescission.

TABLE 1.—SUBMITTED RULES THAT ARE SEPARABLE FROM THE REST OF THE PERMITTING-RELATED RULES

Submitted rule	Title	Adoption date	Submittal date	April 17, 2007 proposed action
NAC 445B.021	“Area source” defined	11/03/93	01/12/06	Disapproval.
NAC 445B.028	“Best available control technology” defined	03/26/96	01/12/06	Disapproval.
NAC 445B.178	“Source reduction” defined	03/03/94	01/12/06	Disapproval.
NAC 445B.196	“Toxic regulated air pollutant” defined	10/03/95	01/12/06	Disapproval.
NAC 445B.22083	Construction, major modification or relocation of plants to generate electricity using steam produced by burning of fossil fuels.	10/04/05	01/12/06	Approval.
NAC 445B.250	Notification of planned construction or reconstruction	10/04/05	01/12/06	Approval.
NAC 445B.252	Testing and sampling	09/18/03	01/12/06	Approval.

In our April 17, 2007 action, we proposed to approve three, and to disapprove four, of the submitted rules we considered separable from the rest of the permitting-related program (see table 1). We proposed approval of Nevada Administrative Code (NAC) 445B.22083, 445B.250, and 445B.252 because they strengthen the SIP and otherwise meet all applicable requirements. We proposed disapproval of NAC 445B.021, 445B.178, and 445B.196 because they define terms that

are not used in any of the other submitted rules or in any of the rules of the existing SIP and thus are unnecessary. We proposed to disapprove NAC 445B.028 (“Best Available Control Technology” defined) because it is not used in any of the other submitted rules and is used only in an existing SIP rule for which we proposed to grant NDEP's rescission request.²

Table 2 lists the submitted rules governing application for, and issuance of, permits for stationary sources under

NDEP jurisdiction in the State of Nevada, excluding the State's rules (yet to be submitted) for review and permitting of major sources and major modifications under parts C and D of title I of the CAA. In our review of these submitted rules, we identified a number of deficiencies that lead us to conclude that the submitted rules do not comply with the requirements of section 110 and 40 CFR part 51, sections 51.160 through 51.164 and that formed the basis for our proposed disapproval.

¹ We note that the stationary source permitting rules that are the subject of this final rule are not intended to satisfy the requirements for pre-construction review and permitting of major sources or major modifications under part C (“Prevention of Significant Deterioration of air quality”) or part D (“Plan requirements for nonattainment areas”) of title I of the Clean Air Act. Of the 100+ permit-related rules or statutes that were submitted by NDEP for approval or for rescission, we are taking final action today on all but two (but, also, see response to comment #1 for

two rules inadvertently left out of our April 17, 2007 proposal). We are deferring action on the State's requests for rescission of rule 25 of general order number 3 of the Nevada Public Service Commission and Nevada Revised Statutes (NRS) 704.820 to 704.900—Construction of utility facilities: utility environmental protection act. Rule 25 of general order number 3 and NRS 704.820–900 relate to new source review under part D, and as such, we will take action on the State's related rescissions after the State submits, and we take action on, a revised “nonattainment” new source

review program under part D of title I of the Clean Air Act.

² “Best Available Control Technology” (BACT) is the control technology requirement under EPA's Prevention of Significant Deterioration (PSD) regulations for pre-construction review and permitting of new major sources and major modifications in attainment or unclassifiable areas, and we would expect this definition to be re-submitted by NDEP when they submit their rules implementing PSD for approval by EPA as a SIP revision.

TABLE 2.—SUBMITTED RULES GOVERNING APPLICATION FOR, AND ISSUANCE OF, PERMITS FOR STATIONARY SOURCES UNDER NDEP JURISDICTION

Submitted rule	Title	Adoption date	Submittal date
NAC 445B.003	"Adjacent properties" defined	11/03/93	01/12/06
NAC 445B.0035	"Administrative revision to a Class I operating permit" defined	08/19/04	01/12/06
NAC 445B.007	"Affected state" defined	11/03/93	01/12/06
NAC 445B.013	"Allowable emissions" defined	10/04/05	01/12/06
NAC 445B.014	"Alteration" defined	10/03/95	01/12/06
NAC 445B.016	"Alternative operating scenarios" defined	10/03/95	01/12/06
NAC 445B.019	"Applicable requirements" defined	01/22/98	01/12/06
NAC 445B.035	"Class I-B application" defined	10/03/95	01/12/06
NAC 445B.036	"Class I source" defined	08/19/04	01/12/06
NAC 445B.037	"Class II source" defined	09/18/01	01/12/06
NAC 445B.038	"Class III source" defined	09/18/01	01/12/06
NAC 445B.044	"Construction" defined	10/04/05	01/12/06
NAC 445B.046	"Contiguous property" defined	09/16/76	01/12/06
Sec. 2 of R096-05	"Dispersion technique" defined	10/04/05	01/12/06
Sec. 3 of R096-05	"Excessive concentration" defined	10/04/05	01/12/06
NAC 445B.066	"Existing stationary source" defined	10/03/95	01/12/06
NAC 445B.068	"Facility" defined	10/03/95	01/12/06
NAC 445B.069	"Federally enforceable" defined	11/03/93	01/12/06
NAC 445B.070	"Federally enforceable emissions cap" defined	11/03/93	01/12/06
NAC 445B.082	"General permit" defined	10/03/95	01/12/06
Sec. 4 of R096-05	"Good engineering practice stack height" defined	10/04/05	01/12/06
NAC 445B.087	"Increment" defined	11/03/93	01/12/06
NAC 445B.093	"Major modification" defined	08/19/04	01/12/06
NAC 445B.094	"Major source" defined	05/10/01	01/12/06
NAC 445B.0945	"Major stationary source" defined	08/19/04	01/12/06
NAC 445B.099	"Modification" defined	10/03/95	01/12/06
NAC 445B.104	"Motor vehicle" defined	05/10/01	01/12/06
Sec. 5 of R096-05	"Nearby" defined	10/04/05	01/12/06
NAC 445B.108	"New stationary source" defined	10/03/95	01/12/06
NAC 445B.117	"Offset" defined	10/03/95	01/12/06
NAC 445B.123	"Operating permit" defined	11/19/02	01/12/06
NAC 445B.124	"Operating permit to construct" defined	11/19/02	01/12/06
NAC 445B.1345	"Plantwide applicability limitation" defined	08/19/04	01/12/06
NAC 445B.138	"Potential to emit" defined	03/26/98	01/12/06
NAC 445B.142	"Prevention of significant deterioration of air quality" defined	11/03/93	01/12/06
NAC 445B.147	"Program" defined	11/03/93	01/12/06
NAC 445B.154	"Renewal of an operating permit" defined	11/03/93	01/12/06
NAC 445B.156	"Responsible official" defined	11/03/93	01/12/06
NAC 445B.157	"Revision of an operating permit" defined	08/19/04	01/12/06
NAC 445B.179	"Special mobile equipment" defined	05/10/01	01/12/06
NAC 445B.187	"Stationary source" defined	05/10/01	01/12/06
NAC 445B.194	"Temporary source" defined	05/10/01	01/12/06
NAC 445B.287	Operating permits: General requirements; exception; restriction on transfers.	08/19/04	01/12/06
NAC 445B.288	Operating permits: Exemptions from requirements; insignificant activities	05/10/01	01/12/06
NAC 445B.295	Application: General requirements	09/06/06	12/08/06
NAC 445B.297	Application: Submission of application and supplementary or corrected information.	08/19/04	01/12/06
NAC 445B.298	Application: Official date of submittal	08/19/04	01/12/06
NAC 445B.305	Operating permits: Imposition of more stringent standards for emissions	10/03/95	01/12/06
NAC 445B.308	Prerequisites and conditions for issuance of operating permits: Environmental evaluation; compliance with control strategy; exemption from environmental evaluation.	09/06/06	12/08/06
NAC 445B.310	Environmental evaluation: Applicable sources	09/06/06	12/08/06
NAC 445B.311	Environmental evaluation: Required information	09/06/06	12/08/06
NAC 445B.313	Method for determining heat input: Class I sources	11/19/02	01/12/06
NAC 445B.3135	Method for determining heat input: Class II sources	11/19/02	01/12/06
NAC 445B.314	Method for determining heat input: Class III sources	11/19/02	01/12/06
NAC 445B.315	Contents of operating permits: Exception for operating permits to construct; required conditions.	11/19/02	01/12/06
NAC 445B.318	Operating permits: Separate permit required for each source; form of application; issuance or denial of permit; posting of permit.	09/06/06	12/08/06
NAC 445B.319	Operating permits: Administrative amendment	08/19/04	01/12/06
NAC 445B.325	Operating permits: Termination, reopening and revision, revision, or revocation and reissuance.	01/22/98	01/12/06
NAC 445B.326	Operating permits: Assertion of emergency as affirmative defense to action for noncompliance.	11/03/93	01/12/06
NAC 445B.331	Request for change of location of emission unit	09/06/06	12/08/06
NAC 445B.3361	General requirements	09/06/06	12/08/06
NAC 445B.3363	Operating permit to construct: Application	09/06/06	12/08/06

TABLE 2.—SUBMITTED RULES GOVERNING APPLICATION FOR, AND ISSUANCE OF, PERMITS FOR STATIONARY SOURCES UNDER NDEP JURISDICTION—Continued

Submitted rule	Title	Adoption date	Submittal date
NAC 445B.33637	Operating permit to construct for approval of plantwide applicability limitation: Application.	08/19/04	01/12/06
NAC 445B.3364	Operating permit to construct: Review of application and determination of completeness by director; notice.	09/06/06	12/08/06
NAC 445B.3365	Operating permit to construct: Required conditions	09/06/06	12/08/06
NAC 445B.33656	Operating permit to construct for approval of plantwide applicability limitation: Required conditions and information.	09/06/06	12/08/06
NAC 445B.3366	Operating permit to construct: Expiration; extension	09/06/06	12/08/06
NAC 445B.3368	Application: Additional requirements; exception	08/19/04	01/12/06
NAC 445B.3375	Class I-B application: Filing requirement	09/06/06	12/08/06
NAC 445B.3395	Review of application and determination of completeness by director; notice; expiration of permit.	09/06/06	12/08/06
NAC 445B.340	Prerequisites to issuance, revision or renewal of permit	01/22/98	01/12/06
NAC 445B.342	Revision of permit: Exception when making certain changes; notification of changes.	09/06/06	12/08/06
NAC 445B.3425	Minor revision of permit	08/19/04	01/12/06
NAC 445B.344	Significant revision of permit	11/19/02	01/12/06
NAC 445B.3441	Administrative revision of permit to incorporate conditions of certain permits to construct.	09/06/06	12/08/06
NAC 445B.3443	Renewal of permit	02/26/04	01/12/06
NAC 445B.3453	Application: General requirements	11/19/02	01/12/06
NAC 445B.3457	Application: Determination of completeness by director	09/06/06	12/08/06
NAC 445B.346	Required contents of permit	10/03/95	01/12/06
NAC 445B.3465	Application for revision	10/04/05	01/12/06
NAC 445B.3473	Renewal of permit	02/26/04	01/12/06
NAC 445B.3477	Class II general permit	11/19/02	01/12/06
NAC 445B.3485	Application: General requirements	09/06/06	12/08/06
NAC 445B.3487	Application: Determination of completeness by director	09/06/06	12/08/06
NAC 445B.3489	Required content of permits	09/06/06	12/08/06
NAC 445B.3493	Application for revision	09/18/01	01/12/06
NAC 445B.3497	Renewal of permits	02/26/04	01/12/06

In our April 17, 2007 proposed action, we noted 10 specific deficiencies. First, we found that certain submitted rules use undefined terms, contain incorrect citations, rely on rules or statutory provisions that have not been submitted for approval as part of the SIP, or multiple versions of the same rule were included in the same submittal, and thus are ambiguous.

Second, we concluded that the definition of “potential to emit” in submitted rule NAC 445B.138 must be revised to require effective limits and to include criteria by which a limit is judged to be practicably enforceable by NDEP.

Third, we found that NDEP’s stationary source program may not be as inclusive as required under the CAA depending upon whether the exclusion of “special mobile equipment” from the definition of “stationary source” in submitted rule NAC 445B.187 extends to engines and vehicles that are not considered to be “nonroad.”

Fourth, we found that the method for determining heat input for class I sources in submitted rule NAC 445B.313 must be amended to require that combustion sources make

applicability determinations based on the maximum heat input.

Fifth, we concluded that NAC 445B.331 (“Request for change of location of emission unit”) must be amended to limit its applicability to location changes within the confines of the existing stationary source at which the emission unit is originally permitted.

Sixth, we found that submitted rule NAC 445B.3477 (“Class II general permit”) must be amended to identify the requirements for general permits, the public participation requirements for issuing such permits, and the criteria by which stationary sources may qualify for such a permit.

Seventh, we found that submitted rule NAC 445B.311 (“Environmental evaluation: Required information”) allows for NDEP to authorize use of a modification or substitution of a model specified in appendix W of 40 CFR part 51 without EPA approval and must be amended accordingly to comply with 40 CFR 51.160(f).

Eighth, to comply with 40 CFR 51.161 (“Public availability of information”), we concluded that the relevant submitted rules must be amended to provide for adequate public review of

new or modified class II sources. Under submitted rule NAC 445B.3457 (“Application: Determination of completeness by Director”), we noted that NDEP may initiate public notice and comment if, after review of an application for a class II permit, NDEP determines that the change to the stationary source results in a significant change in air quality at any location where the public is present on a regular basis. We found that such a provision does not provide well-defined objective criteria for determining when public notice is required to meet the requirements of 40 CFR 51.161.

With respect to the issue of public review of proposed permits, we found that the submitted provisions for class I sources are generally acceptable with the exception of submitted rule NAC 445B.3364 (“Operating permit to construct: Review of application and determination of completeness by director; notice”). Submitted rule NAC 445.3364 must be amended to specifically require that copies of NDEP’s review and preliminary intent to issue or deny a class I operating permit be sent to the Washoe County Health District or the Clark County Department of Air Quality and

Environmental Management for those sources proposed to be constructed or modified in Washoe County or Clark County, respectively. Also, we found that the rules must be amended to provide for public participation for new or modified sources of lead with potential to emit greater than 5 tons per year. See 40 CFR 51.100(k)(2) and 40 CFR 51.161(d).

Ninth, we found that the affirmative defense provision in submitted rule NAC 445B.326 is not approvable under CAA section 110(a)(2) as written because it could be applied to

technology-based emission limitations approved into the SIP.

Lastly, while the submitted rules include a specific prohibition on approving a permit for any source where the degree of emission limitation required is affected by that amount of the stack height as exceeds good engineering practice stack height or any other dispersion technique, we found that the relevant provision (i.e., 445B.308(3)) includes director's discretion (* * * if "the Director determines" * * *), which must be removed in order for EPA to approve the

rules as meeting the requirements of 40 CFR 51.164.

Table 3 lists the permitting-related rules in the existing SIP for which NDEP has requested rescission and for which we proposed action in our April 17, 2007 proposed rule. In our April 17, 2007 action, we proposed to approve rescission requests for Nevada Air Quality Regulations (NAQR) article 13.1.3(3) and NAC 445.706(2) and proposed to disapprove the rescission requests for NAQR articles 1.60 and 1.72 and NAC 445.715.

TABLE 3.—EXISTING PERMITTING—RELATED SIP RULES FOR WHICH THE STATE HAS REQUESTED RESCISSION

Existing SIP rule	Title	Submittal date	Approval date and FR	April 17, 2007 proposed action
NAQR Article 1.60	Effective date	12/29/78	08/27/81 at 46 FR 43141	Disapproval.
NAQR Article 1.72	Existing facility	12/10/76	08/21/78 at 43 FR 36932	Disapproval.
NAQR Article 13, subsection 13.1.3(3).	[BACT requirement in attainment areas].	03/17/80	04/14/81 at 46 FR 21758	Approval.
NAC 445.706(2)	[payment of fees]	10/26/82	03/27/84 at 49 FR 11626	Approval.
NAC 445.715	Operation permits: revocation	10/26/82	03/27/84 at 49 FR 11626	Disapproval.

In our April 17, 2007 action, we proposed approval of the rescission request for NAQR article 13.1.3(3), which applies a control technology requirement defined by Best Available Control Technology (BACT) to certain new sources in attainment areas for the following reasons:

- Air pollution permit programs developed by States under section 110 of the Clean Air Act are not required to impose a BACT requirement on new sources in attainment areas so long as the program is not intended to satisfy part C of title I of the Act;
- Rescission of the SIP BACT requirement would only act prospectively and would not relax emission limits in any existing permits;
- Rescission would not eliminate the BACT requirement for all new sources in Nevada given that BACT continues to be a requirement for new major sources and major modifications in areas, which are designated as attainment or unclassifiable, under EPA's Prevention of Significant Deterioration (PSD) regulations at 40 CFR 52.21 (see 40 CFR 52.1485); and
- We find no evidence to suggest that Nevada is relying on the BACT requirement in NAQR article 13.1.3(3) to maintain the National Ambient Air Quality Standards (NAAQS) in any area.

Thus, we concluded that rescission of the BACT requirement in NAQR article 13.1.3(3) from the SIP would not interfere with continued attainment of

the NAAQS and can therefore be approved under CAA section 110(l).³

We also proposed approval of the rescission request for NAC 445.706(2), which relates to permit fees, because permit fee rules are no longer required for the NDEP portion of the Nevada SIP under CAA section 110(a)(2)(L) given our approval of NDEP's title V program (and related fee requirements). We made our proposed approval of the rescission requests for NAQR article 13.1.3(3) and NAC 445.706(2) contingent upon receipt of documentation from NDEP of notice and public hearing for repeal or rescission of these provisions as required under CAA section 110(l) for all SIP revisions.

In our April 17, 2007 action, we proposed disapproval of the rescission request for NAQR article 1.60 because it defines a term, "effective date," that is relied upon by other terms in the existing SIP that NDEP intends to retain, such as "existing source" as defined in NAQR article 1.73 and "new source" as defined in NAQR article 1.114. We found that the rescission requests for NAQR article 1.72 and NAC 445.715 could otherwise be approved but for the fact that we were proposing disapproval of the submitted set of rules comprising NDEP's current stationary source permitting program (listed in table 2, above). NAQR article 1.72 and NAC

445.715 need to be retained in connection with the stationary source permitting program as approved in the existing SIP, and thus we proposed to disapprove their related rescission requests at this time.

The Technical Support Document (TSD) (dated March 21, 2007) that we prepared for our April 17, 2007 proposed rule provides more details concerning our evaluation of each of the rules listed in tables 1, 2, and 3 and our evaluation of the permitting program as a whole.

II. NDEP's August 20, 2007 SIP Revision Submittal

By letter dated August 20, 2007, NDEP submitted a supplement to the SIP submittal dated January 12, 2006. The August 20, 2007 supplemental SIP submittal includes two statutory provisions and 16 rules, as shown in table 4, below.

The two statutory provisions, Nevada Revised Statutes (NRS) 485.050 ("Motor vehicle" defined) and NRS 482.123 ("Special mobile equipment" defined), are relied upon by one of the rules submitted for approval and included in our April 17, 2007 proposed rule, but had not been submitted for approval into the SIP themselves. We identified their absence as a one of the deficiencies in the submitted permitting program. See 72 FR 19144, at 19148 (April 17, 2007).

The rules contained in NDEP's August 20, 2007 SIP submittal include codifications or recodifications of previously submitted rules. Changes

³ CAA section 110(l) prohibits EPA from approving any SIP revision that would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the CAA.

relative to the previously submitted rules include additional historical notes, updated internal rule references, revised titles, and minor edits. We consider the rules submitted on August 20, 2007 to

supersede the previously submitted rules, and because, in substance, the rules submitted on August 20, 2007 are the same as the corresponding rules that were evaluated in our April 17, 2007

proposed rule, we are taking final action on them in today's notice without initiating a new comment period.

TABLE 4.—PROVISIONS INCLUDED IN NDEP'S AUGUST 20, 2007 SIP REVISION SUBMITTAL

Submitted statutory provision or rule	Title	Adoption date	Submittal date
NRS 485.050	"Motor vehicle" defined	No adoption date	08/20/07
NRS 482.123	"Special mobile equipment" defined	No adoption	08/20/07
NAC 445B.013	"Allowable emissions" defined	10/04/05	08/20/07
NAC 445B.036	"Class I source" defined	08/19/04	08/20/07
NAC 445B.044	"Construction" defined	10/04/05	08/20/07
NAC 445B.054	"Dispersion technique" defined	10/04/05	08/20/07
NAC 445B.064	"Excessive concentration" defined	10/04/05	08/20/07
NAC 445B.083	"Good engineering practice stack height" defined	10/04/05	08/20/07
NAC 445B.107	"Nearby" defined	10/04/05	08/20/07
NAC 445B.157	"Revision of an operating permit" defined	08/19/04	08/20/07
NAC 445B.22083	Construction, major modification or relocation of plants to generate electricity using steam produced by burning of fossil fuels.	10/04/05	08/20/07
NAC 445B.250	Notification of Director: Construction, reconstruction and initial start-up; demonstration of continuous monitoring system performance.	10/04/05	08/20/07
NAC 445B.287(1), (3), and (4)	Operating permits: General requirements; exception; restrictions on transfers.	09/06/06	08/20/07
NAC 445B.297(1)	Application: Submission; certification; additional information	09/06/06	08/20/07
NAC 445B.315	Contents of operating permits: Exception for operating permits to construct; required conditions.	03/08/06	08/20/07
NAC 445B.3368	Additional requirements for application; exception	08/19/04	08/20/07
NAC 445B.342	Certain changes authorized without revision of permit; notification of authorized changes.	10/04/05	08/20/07
NAC 445B.3465	Application for revision	10/04/05	08/20/07

III. Public Comments and EPA Responses

EPA's proposed action provided a 60-day public comment period. See 72 FR 19144 (April 17, 2007). At NDEP's request, we extended the comment period by another 60 days. See 72 FR 31781 (June 8, 2007). During the comment period, we received comments from Michael Elges, Chief, NDEP Bureau of Air Pollution Control, by letter dated August 17, 2007. In addition to the comments themselves, NDEP's August 17, 2007 letter includes four attachments: Attachment A (Draft Proposed Regulation of the State Environmental Commission), attachment B ("ASIP Submittal August 17, 2007"), attachment C ("Clean Copy of the December 8, 2006 ASIP Submittal"), and attachment D ("Commitment to Comply with 40 CFR 51.161(f)").

In the following paragraphs, we summarize the comments and provide our responses thereto. Unless otherwise noted, references in the comments and responses listed below to a TSD relate to the TSD (dated March 21, 2007) that we prepared for our April 17, 2007 proposed rule.

A. Submitted Rules or Rescissions for Which EPA Has Yet To Propose Action

Comment 1: NDEP recounts various SIP revisions submitted as part of the State's efforts in recent years to update a significant portion of the Nevada SIP, including SIP revisions submitted on February 16, 2005, January 6, 2006, and December 8, 2006, and notes that, as of the April 17, 2007 proposed action, the EPA had acted, or proposed action, on every submitted provision and request for rescission with the following exceptions: NAC 445B.200 and 445B.227, which have not been acted on; and the request to rescind existing SIP provision NAC 445.694.

Response 1: We agree with this comment, and discuss our plans for the two submitted rules and one rescission request cited in the comment in the following paragraphs.

Submitted rule NAC 445B.200 ("Violation" defined) would update existing SIP rule NAC 445.649 ("Violation" defined), which we approved on March 27, 1984 at 49 FR 11626, and is used in connection with the permitting program. NAC 445B.200 is acceptable but is not separable from the rest of the permitting program. Thus, it should have been included in the set of rules comprising the permitting

program for which we proposed disapproval in our April 17, 2007 action. We anticipate that we will propose approval of this definition at such time as we propose to approve an amended, and re-submitted, permitting program.

Submitted rule NAC 445B.227 ("Prohibited conduct: Operation of source without required equipment; removal or modification of required equipment; modification of required procedure") would update existing SIP rule NAC 445.664 ("Pollution control equipment: Operation; modification; removal"), which we approved on March 27, 1984 at 49 FR 11626. NAC 445B.227 is acceptable and, while it is related to the permit program, it is separable from it. Thus, it should have been proposed for approval along with the other separable rules that were proposed for approval on April 17, 2007. We do not expect to take action on NAC 445B.227 as part of our rulemakings on the permitting program but will take action on it in a separate rulemaking.

Existing SIP rule NAC 445.694 ("Emission discharge information") was included in the list of SIP definitions and rules for which NDEP requested rescission in NDEP's January 12, 2006

SIP revision submittal. On August 28, 2006 (71 FR 50875), we proposed action on the vast majority of requested rescissions. In the TSD (dated August 16, 2006) that we prepared for that proposal, we concluded that NAC 445.694 relates to a specific SIP requirement but deferred any action on the rescission of NAC 445.694 to allow NDEP the opportunity to explain how other SIP rules meet the same SIP purposes as NAC 445.694 thereby making the latter rule unnecessary for retention in the SIP. To date, no explanation has been forthcoming. Because NAC 445.694 is not related to the permitting program, we do not expect to propose action on NAC 445.694 as part of our rulemakings on the permitting program but will take action in a separate rulemaking.

B. Submitted Rules Found to be Separable From Rest of Permitting Program

Comment 2: NDEP agrees with the proposed actions on the seven rules found to be separable from the set of rules comprising the permitting program.

Response 2: We are finalizing in today's action our disapproval of four submitted definitions: NAC 445B.021 ("Area source" defined), NAC 445B.028 ("Best available control technology" defined), NAC 445B.178 ("Source reduction" defined), and NAC 445B.196 ("Toxic regulated air pollutant" defined) because these definitions are not used in the submitted SIP nor in the existing SIP.

We are also finalizing our approval of three rules submitted by NDEP: NAC 445B.22083 ("Construction, major modification or relocation of plants to generate electricity using steam produced by burning of fossil fuels") and NAC 445B.250 ("Notification of Director: Construction, reconstruction and initial start-up; demonstration of continuous monitoring system performance"), and NAC 445B.252 ("Testing and sampling") because they update and strengthen the SIP. With respect to NAC 445B.22083 and 445B.250, NDEP submitted the most current versions in a SIP revision submittal dated August 20, 2007. The versions of NAC 445B.22083 and 445B.250 submitted on August 20, 2007 represent recodifications of the versions submitted on January 12, 2006 and proposed for approval on April 17, 2007 and thus differ only in minor respects (e.g., titles, updated internal rule references, and historical notes). In this final action, we are approving the August 20, 2007 submitted versions of NAC 445B.22083 and 445B.250.

Our approval of these rules has the effect of replacing the following rules in the applicable SIP: NAC 445B.22083, as submitted on November 30, 2003 and approved on September 7, 2004 (69 FR 54006), NAQR article 2.16.1, as submitted on December 10, 1976 and approved on August 21, 1978 (43 FR 36932), and NAC 445.682, as submitted on October 26, 1982 and approved on March 27, 1984 (49 FR 11626).

C. Rules Comprising the Submitted Permit Program

1. Definitions

Comment 3: With respect to EPA's evaluation of NAC 445B.036 ("Class I source" defined), NDEP disagrees with EPA's conclusion that the definition should be clarified.

Response 3: We continue to maintain that clarification of the definition would be helpful for the reasons set forth in the TSD on pages 13–14, but we do not view the marginal potential for confusion inherent in the rule's current form to be an approvability issue.

Comment 4: In response to EPA's evaluation of NAC 445B.038 ("Class III source" defined), NDEP agrees to propose a change in the definition to deny Class III status to sources that are subject to 40 CFR part 63.

Response 4: A change in the definition in NAC 445B.038 consistent with the draft revision shown in attachment A to NDEP's comment letter would fully respond to EPA's findings related to this definition.

Comment 5: In response to EPA's evaluation of NAC 445B.069 ("Federally enforceable" defined), NDEP agrees to propose a change in the definition to more closely mirror the Federal definition.

Response 5: A change in the definition in NAC 445B.069 consistent with the draft revision shown in attachment A to NDEP's comment letter would partially respond to EPA's findings related to this definition. However, to avoid unnecessary ambiguity, we continue to believe NAC 445B.069 must more closely match EPA's definition of "federally enforceable." For instance, the draft revised version of NAC 445B.069 provided in attachment A to NDEP's comment letter, while improved from the existing version, does not include "requirements within any applicable State implementation plan," a source of enforcement authority that should be cited in the definition of this term.

Comment 6: In response to EPA's evaluation of "Section 4 of Regulation R096–05" ("Good engineering practice stack height" defined), NDEP intends to

propose the adoption of the definition of "commence" as found in 40 CFR 51.166(b)(9).

Response 6: Adoption of a definition for the term, "commence," as shown in attachment A of NDEP's comment letter, would fully respond to EPA's findings with respect to "Section 4 of Regulation R096–05."

Comment 7: In response to EPA's evaluation of NAC 445B.104 ("Motor vehicle" defined), NDEP intends to submit the statutory provision (NRS 485.050) upon which NAC 445B.104 relies.

Response 8: Submittal of NRS 485.050 ("Motor vehicle" defined) as shown in attachment B of NDEP's comment letter would fully respond to EPA's findings with respect to NAC 445B.104.

Comment 9: With respect to EPA's evaluation of NAC 445B.138 ("Potential to emit" defined), NDEP disagrees with our conclusion that the definition must be amended and believes that when the definition of "potential to emit" (PTE) in NAC 445B.138 is considered with the definition of "enforceable" in NAC 445B.060, NDEP's ability to determine PTE is clear and practicably enforceable and does not hinder Federal enforcement under the SIP.

Response 9: We disagree that the definition of "enforceable" in NAC 445B.060, which states "'Enforceable' means enforceable under federal, state or local law," addresses the deficiency identified by EPA in the definition of PTE in NAC 445B.138 in the proposed rule and described in more detail on pages 19–20 of the TSD. In the proposed rule, we concluded that the definition of "potential to emit" in submitted rule NAC 445B.138 must be revised to require effective limits and to include criteria by which a limit is judged to be practicably enforceable by NDEP. In other words, PTE limits must be legally *and* practicably enforceable, and the current definition of PTE in NAC 445B.138 satisfies the former (i.e., legal authority to enforce) but not the latter (i.e., practicable to enforce). By including criteria under which a limit is determined by NDEP to be effective as a practical matter (examples of such criteria are included in the TSD), NDEP can address the issue of practicable enforcement.

Whereas the proposed rule calls for the definition in NAC 445B.138 to be amended, we now believe that NDEP has several options for fixing the deficiency discussed above. A rule change is one option, but other options, such as the development of policy documents to be relied upon by NDEP permitting staff to establish permit limits that are practicably enforceable,

or some combination of rule change and policy guidance, could also accomplish the same overall objective. The objective is to ensure that any physical or operational limitations on the capacity of stationary source to emit a regulated air pollutant that is treated as part of the source's design for the purposes of determining PTE is both legally and practically enforceable.

Comment 10: In response to EPA's evaluation of NAC 445B.179 ("Special mobile equipment" defined), NDEP intends to submit the statutory provision (NRS 482.123) upon which NAC 445B.179 relies.

Response 10: Submittal of NRS 482.123 ("Special mobile equipment" defined) as shown in attachment B of NDEP's comment letter would fully respond to EPA's findings with respect to NAC 445B.179.

Comment 11: With respect to EPA's evaluation of NAC 445B.187 ("Stationary source" defined), NDEP plans no changes to this definition. NDEP indicates that the State's definition of "special mobile equipment" is more expansive than the Federal definition of "nonroad engine" in 40 CFR 89.2 and is therefore being retained. NDEP believes that it is clear that "special mobile equipment," as defined by the State, does not include engines that are used in stationary applications.

Response 11: On pages 21–22 of our TSD, we explain that the definition of "stationary source" in NAC 445B.187 is acceptable if NDEP can explain how the submitted definition complies with CAA section 302(z) notwithstanding the exclusion of internal combustion engines that do not fall within the nonroad engine or nonroad vehicle categories. NDEP's statement that the NAC definition of "special mobile equipment" is more expansive than the definition of "nonroad engine" in 40 CFR 89.2 simply adds weight to EPA's concerns over the exclusion of "special mobile equipment" from the meaning of "stationary source." To the extent that the definition of "stationary source" in NAC 445B.187, by exempting "special mobile equipment," excludes internal combustion engines other than nonroad engines and those used for transportation purposes, the definition is unacceptable. See CAA section 302(z).

For instance, the term "nonroad engine" includes an internal combustion engine that, by itself or in or on a piece of equipment, is portable or transportable, except where such an engine remains or will remain at a location for more than 12 consecutive months or a shorter period of time for

an engine located at a seasonal source. See 40 CFR 89.2. Where such an engine remains or will remain at a location for more than 12 consecutive months (or a shorter period of time for an engine located at a seasonal source), the engine should be included in the definition of "stationary source" under NAC 445B.187, but may be excluded in the current version of the definition by virtue of the exclusion for "special mobile equipment." For a detailed discussion of the applicability of new source review to internal combustion engines, see 61 FR 38250, at 38306–38307 (July 23, 1996).

2. General Provisions

Comment 12: In response to EPA's evaluation of NAC 445B.252 ("Testing and sampling"), NDEP agrees to propose a change in the rule to replace the term "method of reference" with "reference method."

Response 12: The proposed change in NAC 445B.252 (as shown in attachment A to NDEP's comment letter) would fix the minor deficiency in this rule identified by EPA on page 23 of the TSD.

3. Operating Permits Generally

Comment 13: In response to EPA's evaluation of NAC 445B.287 ("Operating permits: General requirements; exception; restriction on transfer"), NDEP agrees to submit a subsection cited, but not included, in the submitted version of the rule, but requests clarification from EPA as to why a title V provision, such as the cited subsection, should be in the applicable SIP.

Response 13: We did not recognize the missing subsection (i.e., subsection 2), which provides for an exemption from permit revision requirements for certain Class I sources, as a title V only provision, but believe that it needs to be submitted to allow for proper interpretation and application of the rule.

Comment 14: With respect to EPA's evaluation of NAC 445B.288 ("Operating permits: Exemptions from requirements; insignificant activities"), NDEP disagrees that the rule should be amended to exclude from exemption agricultural equipment which is subject to any standard set forth in 40 CFR part 63. With respect to emergency generator provisions, NDEP intends to propose amendments to the rule to extend the limitation on emergency generators that qualify as an "insignificant activity" from class II sources to all stationary sources.

Response 14: We view the absence of a limitation on the application of the

exemption for agricultural equipment subject to any standard set forth in 40 CFR part 63 as a minor deficiency but continue to encourage NDEP to make the suggested change. With respect to emergency generators, we find that adoption of the amendment to NAC 445B.288, as shown in attachment A to NDEP's comment letter, would fully respond to EPA's findings with respect to that issue.

Comment 15: With respect to EPA's evaluation of NAC 445B.308 ("Prerequisites and conditions for issuance of operating permits: Environmental evaluation; compliance with control strategy; exemption from environmental evaluation"), NDEP indicates that the issue of multiple rule submittals has been resolved by supplemental material, entitled "Clean Copy of the December 8, 2006 ASIP Submittal," submitted on February 13, 2007 and re-submitted as a courtesy as attachment C to NDEP's comment letter. Second, NDEP asserts that the issue of director's discretion in subsection (3) of NAC 445B.308 is adequately addressed by the limits and criteria established in a separate rule, specifically NAC 445B.311(3), and intends to propose amendments to NAC 445B.308(3) to refer to the criteria in NAC 445B.311(3).

Response 15: We agree that NDEP resolved the potential for confusion arising from multiple rule submittals through submittal of the supplemental material on February 13, 2007. We also find that the draft amendment to NAC 445B.308, as shown in attachment A to NDEP's comment letter, would resolve the director's discretion issue.

Comment 16: With respect to EPA's evaluation of NAC 445B.311 ("Environmental evaluation: Required information"), NDEP notes that NAC 445B.083, which is cited in NAC 445B.311, is being submitted to EPA for action as a SIP revision. Second, NDEP attaches a commitment to obtain EPA's approval before authorizing the modification of a model in 40 CFR part 51, appendix W.

Response 16: We find that NDEP's submittal of NAC 445B.083, as shown in attachment B to NDEP's comment letter, resolves the issue of a hanging reference in NAC 445B.311. With respect to approval of modified or substitute models, we find that the submittal of a commitment by NDEP to obtain EPA's written approval (included as attachment D to NDEP's comment letter) fails to adequately resolve this deficiency. Any such commitment such as the one submitted by NDEP must be incorporated into the SIP, and as such, must be submitted to EPA as a SIP revision following the usual SIP

revision procedures, including notice and opportunity for public comment. More importantly, a separate commitment by NDEP does not ensure notice to permit applicants of this requirement and therefore may lead to disputes over source impacts and related control technology that could be avoided if the requirement were written into the rule. Therefore, we encourage NDEP to propose an amendment to NAC 445B.311 to require EPA written approval for use of a modified or substitute model and to re-submit the rule, as amended, to EPA for approval as part of the SIP.

Comment 17: With respect to EPA's evaluation of NAC 445B.313 ("Method for determining heat input: Class I sources"), NDEP intends to propose amendments to the rule to require the maximum heat input to be determined by combining the maximum fuel input rate and the total calorific value of the fuel or fuel(s) combusted. NDEP also intends to propose amendments to the rule to clarify that appropriate ASTM methods must be used for determining heat input.

Response 17: NDEP's amendments to NAC 445B.313, as shown in attachment A to NDEP's comment letter, would not resolve the deficiency identified by EPA. NDEP's amendments add the word "maximum" prior to "heat input" and then delete the references to 40 CFR parts 51, 52, 60, and 61. However, the amended rule still does not specify the appropriate method for determining heat input. As described on page 29 of our TSD, the appropriate method is as follows: the maximum heat input is determined by combining the maximum fuel rate, determined by the manufacturer, with the total calorific value of the fuel. ASTM methods are used to determine the calorific values of fuels.

Comment 18: With respect to EPA's evaluation of NAC 445B.326 ("Operating permits: Assertion of emergency as affirmative defense to action for noncompliance"), NDEP states that it seems obtuse that an emission limitation, established in an integrated construction/operating permit or an operating permit to construct, would be allowed to have an affirmative defense for an emergency under a title V operating permit but would not be allowed to have that same defense in a SIP-based permit that established the technology-based limitation to begin with.

Therefore, NDEP maintains that NAC 445B.326 is fully approvable as submitted.

Response 18: Normally, an air pollution control agency issues a

preconstruction permit to a new source or modification, and the preconstruction permit will contain all of the technology-based emission limitations necessary for the source or modification to comply with the SIP. For certain sources, these SIP-based emission limitations are then included in title V operating permits. Noncompliance with such limitations can trigger either enforcement of the SIP requirements or the conditions of the title V permit.

NDEP's program, in contrast, is an integrated program combining both preconstruction and title V operating permit requirements. As noted on pages 31–32 of our TSD, submitted rule NAC 445B.326 is acceptable with respect to enforcement actions brought for noncompliance with title V operating permit conditions. If EPA were to approve it into the SIP, the affirmative defense as set forth in NAC 445B.326 would also apply to the underlying SIP requirements. However, in its current form, NAC 445B.326 does not provide the requisite protection for the NAAQS and PSD increments as called for under CAA section 110(a)(2).

For example, the affirmative defense in NAC 445B.326 does not distinguish between penalties and injunctive relief, and if adequately supported by a source, applies to both types of claims. EPA recognizes that, while imposition of penalties under certain circumstances may not be appropriate, SIPs must provide for attainment and maintenance of the NAAQS and protection of PSD increments, and thus, EPA cannot approve into the SIP a provision that would undermine that fundamental SIP purpose. Thus, for SIP approval, an acceptable affirmative defense provision can apply only to penalties, and not to injunctive relief. This restriction ensures that both state and federal authorities remain able to protect the NAAQS and PSD increments.

We have published guidance to advise States on the types of considerations that should be taken into account in developing a SIP rule providing an affirmative defense to excess emissions caused by malfunction. See EPA memorandum, "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, et al, dated September 20, 1999.

Comment 19: With respect to EPA's evaluation of NAC 445B.331 ("Request for change of location of emission unit"), NDEP indicates that the provision applies to changes of location of an emission unit both within the

confines of a stationary source and outside the confines of a stationary source. NDEP explains that NAC 445B.331 relates to temporary sources and that such sources must choose between two types of permits: A normal stationary source operating permit or a general operating permit. If the former is chosen, the normal permitting process occurs, and if the latter is chosen, the owner or operator must obtain a general operating permit and request to operate at the selected location within the constraints of the general operating permit. Either way, an environmental evaluation is performed to ensure compliance with the NAAQS. NDEP further explains that the request for approval of a specific location under NAC 445B.331 simply allows the NDEP to evaluate the owner or operator's proposal to ensure that the proposal complies with the terms and conditions of the general operating permit. Thus, NDEP believes that no changes in this provision are warranted.

Response 19: On page 32 of our TSD, we concluded that NAC 445B.331 must be amended to clarify that it only provides for changes in locations of emission units within the confines of existing sources at which the units are located. With NDEP's explanation summarized above, however, we now believe that NAC 445B.331 need not be so limited and that NDEP's approach to temporary sources is reasonable. Nonetheless, we conclude that amendments in NAC 445B.331 are still necessary to carry out the approach that NDEP describes in its comment letter because the rule, in its current form, does not cross-reference either the normal operating permit provisions or the general permit provisions. The purpose of such amendments would be to clarify that one or the other type of permit is required notwithstanding the ten-day advance notice provision in the rule.

4. Class I Operating Permits

Comment 20: With respect to EPA's evaluation of NAC 445B.3363 ("Operating permit to construct: Application"), NDEP indicates that the issue of multiple rule submittals has been resolved by supplemental material, entitled "Clean Copy of the December 8, 2006 ASIP Submittal," submitted on February 13, 2007 and re-submitted as a courtesy as attachment C to NDEP's comment letter.

Response 20: We agree that NDEP resolved the potential for confusion arising from multiple rule submittals through submittal of the supplemental material on February 13, 2007.

Comment 21: With respect to EPA's evaluation of NAC 445B.33637 ("Operating permit to construct for approval of plantwide applicability limitation: Application"), NDEP disagrees with EPA's observation that NAC 445B.33637(1)(e) is missing text between the words "limitation" and "based."

Response 21: NDEP's explanation is satisfactory, and we no longer believe that any text is missing in NAC 445B.33637(1)(e).

Comment 22: With respect to EPA's evaluation of NAC 445B.3364 ("Operating permit to construct: Review of application and determination of completeness by director; notice"), NDEP indicates that the issue of multiple rule submittals has been resolved by supplemental material, entitled "Clean Copy of the December 8, 2006 ASIP Submittal," submitted on February 13, 2007 and re-submitted as a courtesy as attachment C to NDEP's comment letter. Second, NDEP intends to amend NAC 445B.3364, as well as NAC 445B.3395, to provide notice specifically to Clark and Washoe Counties for construction or modification of sources affecting those counties. Third, NDEP requests clarification with respect to federal requirements for public notice regarding lead.

Response 22: First, we agree that NDEP resolved the potential for confusion arising from multiple rule submittals through submittal of the supplemental material on February 13, 2007.

Second, we find that the amendments in NAC 445B.3364 and NAC 445B.3395 shown in attachment A to NDEP's comment letter address the issue of providing notice to county APCDs but, for the purpose of clarity, we recommend that the word "any" be substituted for the word "each" in the draft amendment to NAC 445B.3364(6)(e) and that the word "affected" be added immediately before the term "local air pollution control agency" in the draft amendment to NAC 445B.3395(7)(b)(2).

Third, with respect to lead ("Pb"), the federal requirements for public notice regarding lead in 40 CFR 51.161(d) can be explained by examining EPA rulemaking actions that culminated in the language now found in 40 CFR 51.161(d). These actions include EPA's proposed restructuring of the requirements for SIPs in 40 CFR part 51 at 48 FR 46152 (October 11, 1983) and corresponding final rule at 51 FR 40656 (November 7, 1986). As described in our 1983 proposal, one of the goals for restructuring was to reduce reporting

requirements. To further this goal, we proposed to limit the requirement on States to notify EPA of all air permitting actions to cover only major sources in nonattainment areas and, with respect to pollutants for which no area designations are established (such as Pb at the time), all point sources.⁴ Ultimately, EPA decided not to limit the reporting requirement but to retain the pre-existing requirement on States to notify EPA of all permitting actions, except for Pb. See 51 FR 40656, at 40658 (November 7, 1986). For new or modified sources of Pb, EPA finalized the proposed "point source" threshold for notification to EPA of proposed permits.

Thus, since the point source threshold for Pb is 5 tons per year in 40 CFR 51.100(k)(2), the reporting requirement in 40 CFR 51.161(d), as it relates to Pb emissions, attaches to new sources of Pb with potential to emit 5 tons per year or more and to any modifications of such sources that increase Pb emissions. The use of the term "actual emissions" in the definition of "point source" in 40 CFR 51.100(k)(2) is not inconsistent with our interpretation above because, in the NSR context, for a source not yet constructed, "actual emissions" equal the PTE. See 40 CFR 51.166(b)(21)(iv).

Comment 23: With respect to EPA's evaluation of NAC 445B.3366 ("Operating permit to construct: Expiration; extension"), NDEP agrees that a definition of "commence" and related definitions should be added to its rulebook.

Response 23: We have reviewed the definitions of "commence," "necessary preconstruction approvals or permits," and "begin actual construction" as shown in attachment A to NDEP's comment letter. We find the definitions of "commence" and "begin actual construction" to be essentially the same as the corresponding definitions in 40 CFR 51.166(b) and to be acceptable. NDEP's draft definition of "necessary preconstruction approvals or permits" substitutes "pursuant to NAC 445B.001 to 445B.3689, inclusive," for "under Federal air quality control laws and regulations" as set forth in 40 CFR 51.166(b)(10). We will not approve a deviation from the Federal definition of the same NSR term unless the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as

the corresponding Federal definition. See 40 CFR 51.166(b).

5. Class II Operating Permits

Comment 24: With respect to EPA's evaluation of NAC 445B.3457 ("Application: Determination of completeness by director"), NDEP asserts that EPA was incorrect in concluding that the same prescriptive requirements in 40 CFR 51.160(e) also exist in 40 CFR 51.161(a) and disagrees that "well-defined objective criteria" are required to meet the State's obligations for public notice under 40 CFR 51.161. NDEP asserts that implementation of a one-size-fits-all de minimis emissions approach would be more susceptible to an assertion of being arbitrary and capricious, would unduly limit the NDEP's ability to notify the public in a manner that is best suited for Nevada, would be inconsistent with the State/EPA partnership Congress intended under the CAA, and would prohibit public notice for sources with emissions less than de minimis levels.

Also, NDEP asserts that EPA has made conflicting statements with respect to acceptable public notice requirements. On one hand, EPA indicates, without proper support, that the submitted rules would weaken the existing SIP with respect to permitting of all sources except class I sources. On the other hand, EPA goes on to say that States may exempt from review changes that are not environmentally significant implying that the SIP can be weakened in this respect.

Lastly, NDEP points the EPA to Congress' intent in CAA section 101(a)(3) that States are obligated and responsible for the creation and implementation of air pollution prevention and control at sources. The EPA is required to provide technical and financial assistance to States in connection with the development and execution of their air pollution prevention and control programs.

Response 24: First, we do not interpret our regulations so as to apply the same prescriptive requirements found in 40 CFR 51.160(e) to 40 CFR 51.161(a). The former requires States or local agencies to identify types and sizes of facilities, buildings, structures, or installations which will be required to apply for a permit for a new source or modification and discuss the basis for determining which facilities will be subject to review. The latter requires the State or local agency to provide the opportunity for public comment on information provided by permit applicants and on the agency's related analysis and proposed action on the permit application.

⁴ The 1983 proposal incorrectly used the term "major source" in connection with the notice requirement for new or modified sources of pollutants for which no designations are established. As explained in our 1986 final rule, EPA intended the term "point source." See at 51 FR 40656, at 40659 (November 7, 1986).

Under 40 CFR 51.161(a), and unlike 40 CFR 51.160(e), the State or local agency is not required to identify types of permit applications that will be subject to review nor discuss the basis for that decision. Rather, the public review requirements apply to each and every permit action proposed by the State or local agency. However, if the State or local agency chooses to exempt some new sources or modifications subject to permitting from public participation requirements, it must do so consistent with the *de minimis* principle set forth in *Ala. Power Co. v. Costle*, 636 F.2d 323, at 360–361 (D.C.Cir. 1979)⁵ and by application of well-defined objective criteria. NDEP's current approach fails the *de minimis* principle by foregoing public notice for sources up to 100 tons per year and substitutes Director's discretion for well-defined objective criteria.

On page 49 of our TSD, we indicate that we believe that a State may tailor the public participation process for less environmentally significant sources and modifications and note that NDEP could limit mandatory public notice to a subset of Class II sources based on *de minimis* thresholds and allow for Director's discretion to require public notice below those thresholds.⁶ Our objection to NDEP's current approach is the use of 100 tons per year as the

threshold above which public notice is mandatory given that NDEP has provided no demonstration that 100 tons per year represents an acceptable *de minimis* level below which the burden of public notice on sources yields a gain of trivial or no value. NDEP might consider lowering the mandatory public process thresholds from 100 tons per year to the thresholds used in connection with environmental evaluations. We believe that NDEP, for instance, might be able to demonstrate that the thresholds triggering preparation of environmental evaluations are appropriate thresholds for mandatory public notice consistent with the *de minimis* principle.

Second, NDEP indicates that EPA has not justified the conclusion that the public participation requirements for class II sources (which are found in NAC 445B.3457) weaken the existing SIP. The basis for our conclusion is a comparison of NAC 445B.3457 with the corresponding rule in the existing SIP. The existing SIP rule, NAC 445.707 [subsection (3)] is cited on page 37 of our TSD in connection with our review of NAC 445B.3457. NAC 445.707 [subsection (3)] requires the director to give preliminary notice of his intent to issue or deny a "registration certificate" for a single source within 15 days after receiving adequate information for reviewing the registration application. This obligation on the director attaches to all applications for "registration certificates" (which are now referred to as permits).

In connection with our review of NAC 445B.3457, we should also have cited existing SIP NAC 445.707 [subsections (4) and (5)], which require the application, the director's review and preliminary intent to issue or deny a registration certificate to be made public, provides for a 30-day comment period, and requires the director to take into account written public comments, among other requirements. Once again, the public notice and 30-day comment period requirements attach to all applications. Thus, the submitted approach that limits mandatory public notice and comment to sources greater than 100 tons per year clearly weakens the SIP relative to public participation for permitting of new sources and modifications. Our conclusion in this regard does not imply that no relaxation from the existing SIP can be approved. Rather, we indicate in our TSD that we believe that exemptions from the public notice and comment can be approved so long as such exemptions are supported under the *de minimis* principle discussed above.

Lastly, with respect to the State/EPA partnership established by Congress through the CAA, we recognize that air pollution prevention and air pollution control at its source is the primary responsibility of States and local governments. We are also cognizant of EPA's responsibility under the CAA to ensure that each State adopt and submit a plan which provides for implementation, maintenance, and enforcement of the NAAQS. EPA fulfills this responsibility in part by approving or disapproving SIPs and SIP revisions submitted under CAA section 110 for compliance with the CAA and EPA's SIP rules in 40 CFR part 51. Our review and action on the State's submittal of its stationary source permitting program, including the provisions related to public notice, comport with our responsibilities under the CAA.

Comment 25: With respect to EPA's evaluation of NAC 445B.3477 ("Class II general permit"), NDEP notes that, under Nevada's regulations, a "general permit" is a type of operating permit (one issued by the Director to cover numerous similar stationary sources) and that requirements for a general permit and the criteria by which sources may qualify for a general permit are found in the general permit. Second, NDEP agrees to propose amendments to NAC 445B.3477 to add public participation requirements.

Response 25: On page 38 of our TSD, we indicated that NAC 445B.3477 must identify the requirements for general permits, the public participation requirements for issuing such permits, and the criteria by which stationary sources may qualify for such a permit. Based on NDEP's explanation, we now recognize the "general permit" as a type of operating permit (under NAC 445B.082) that, as such, is subject to the requirements that apply generally to Class II operating permits. We now also understand that NDEP performs a worst-case environmental evaluation to ensure that the terms and conditions of the general operating permit will ensure compliance with the NAAQS and are consistent with the Class II operating permit requirements (see page 5 of NDEP's comment letter), has traditionally provided for public notice of general permits (although not required to do so by the terms of the rule), and has recently drafted revisions to NAC 445B.3477 to require such public notice in the future. We have reviewed the draft public notice provisions that have been added to NAC 445B.3477 (as shown in attachment A to NDEP's letter) and find them acceptable.

Thus, we find that our objections to NAC 445B.3477 have been satisfactorily

⁵ While the *Alabama Power* court discusses the *de minimis* principle in the context of a Federal administrative agency's authority in promulgating rules to satisfy statutory requirements, the same principle can be applied where a State promulgates rules to satisfy requirements by a Federal administrative agency. With regards to the *de minimis* principle, the Alabama Court writes: "Determination of when matters are truly *de minimis* naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing. But we think most regulatory statutes, including the Clean Air Act, permit such agency showings in appropriate cases. While the difference is one of degree, the difference of degree is an important one. Unless Congress has been extraordinarily rigid, there is likely a basis for an implication of *de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value. That implied authority is not available for a situation where the regulatory function does provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs. For such a situation any implied authority to make cost-benefit decisions must be based not on a general doctrine but on a fair reading of the specific statute, its aims and legislative history." See *Ala. Power Co. v. Costle*, 636 F.2d 323, at 360–361 (D.C. Cir. 1979).

⁶ Thus, with respect to the circumstances described by NDEP involving a very small medical waste pyrolysis facility, EPA does not mean to imply that, by establishing *de minimis* thresholds for mandatory public notice, a State should limit its discretion to require public notice for sources below such thresholds. To the contrary, below such thresholds, we believe it to be appropriate that a State retain authority to require public notice in light of special or unusual circumstances.

resolved except for the environmental evaluation requirement, which has been performed in practice, but is not required by the terms of the rule as a prerequisite to issuing a Class II general permit. The environmental evaluation is the tool by which NDEP determines whether new or modified sources would result in a violation of the NAAQS but is not required for all Class II permits; thus, NAC 445B.3477 must be amended to clearly require environmental evaluations for all class II general permits. We also suggest clarifying that general permits are a specific type of Class II permit.

6. Other Issues

Comment 26: With respect to EPA's suggestion to add the phrase "as incorporated by reference" to a number of rules to be consistent with the use of that phrase in other rules, NDEP plans to review the use of the phrase throughout chapter 445B of the NAC for consistency and amend as appropriate.

Response 26: This is acceptable. As noted on page 53 of the TSD, we view this issue as one for which clarification is warranted but not as one that affects approvability of the submittal.

D. Rescissions of Permitting-Related Rules From Applicable SIP

Comment 27: NDEP agrees with our proposal to disapprove certain rescissions, and to approve certain other rescissions, of permit-related provisions in the existing SIP. NDEP also provides additional background information supporting our proposed approval of the rescission request for NAQR article 13.1.3(3), and identifies public process documentation for rescission of NAQR article 13.1.3(3) and NAC 445.706(2) in previously-submitted materials.

Response 27: In today's action, we are finalizing our disapproval of the rescissions of NAQR article 1.60 ("Effective date"), NAQR article 1.72 ("Existing facility"), and NAC 445.715 ("Operating permits: revocation") from the applicable SIP. We are disapproving the rescissions of these three provisions because, as described on pages 55–59 of the TSD, the provisions are relied upon by other rules that remain in the applicable SIP. NAQR article 1.72 and NAC 445.715 may be rescinded at such time as we act to approve the rules comprising the overall stationary source permitting program.

We are also finalizing our approval of the rescissions of NAQR article 13.1.3(3) [Minor source BACT] and NAC 445.706(2) ("Application date: payment of fees") from the applicable SIP. Our rationale for approving the rescission of these two provisions is provided on

pages 56–58 of the TSD. In short, we are approving the rescission of NAC article 13.1.3(3) because controls representing "best available control technology" (BACT) are not required for minor sources and minor modifications, rescission of the minor source BACT requirement would not have a retroactive effect, rescission would only affect a subset (not all) of new minor sources, and we find no evidence that NDEP is relying on the BACT requirement in article 13.1.3(3) to maintain the NAAQS in any area. We are approving the rescission of NAC 445.706(2) because permit fee rules are no longer a SIP requirement in areas, such as those under NDEP jurisdiction, that have an approved title V program.

We do not agree with NDEP that a review of regulatory history clearly shows that the State's intent in adopting the BACT requirement in NAQR article 13.1.3(3) was to apply BACT only to PSD major sources and major modifications. Our review indicates that the State intended to apply BACT to the same types of sources and modifications in attainment areas as were subject to a control technology representing the lowest achievable emissions rate (LAER) in nonattainment areas. Thus, since LAER was triggered at 100 tons per year in nonattainment areas (for nonattainment pollutants), the State intended that BACT be triggered at 100 tons per year in attainment areas, thereby extending the applicability of BACT beyond that required under PSD (except for certain source categories for which a 100 ton per year threshold applies under PSD). Notwithstanding our disagreement with NDEP regarding the State's intent in adopting the BACT requirement, we are finalizing the rescission of the requirement from the applicable Nevada SIP for the reasons set forth in our TSD and summarized above.

In our proposed rule, we indicated that our approval of the rescissions of these two provisions was contingent upon receipt of public notice and hearing documentation from the State. See 73 FR 19144 (April 17, 2007). In response, NDEP has identified the relevant public process documentation in materials previously-submitted to EPA. Specifically, NDEP shows that NAQR article 13.1.3(3), later re-codified as NAC 445.708(2)(c), was repealed by the State Environmental Commission (SEC) on August 29, 1990, and that NAC 445.706(2) was repealed by the SEC on November 3, 1993. Documentation for both actions, and related public process, is found in NDEP's SIP revision submittal dated February 16, 2005. Upon review of the public process

documentation identified by the State, we find that the State has met the contingency placed by us on the proposed approval of the requested rescissions of these two provisions from the applicable SIP.

IV. EPA Action

In its comment letter dated August 17, 2007, NDEP explains how it intends to remedy many of the deficiencies in the State's rules that govern application for, and issuance of, permits to stationary sources and that EPA identified in the April 17, 2007 proposed rule, but several important deficiencies, such as insufficient public notice, remain unresolved. Therefore, pursuant to CAA section 110(k)(3), we are finalizing our action as proposed on April 17, 2007 with the exception that, for a small subset of rules, our final action relates to amended rules submitted by NDEP on August 20, 2007 rather than the versions of the corresponding rules submitted earlier and included in our April 17, 2007 proposal (see Table 4, above).

Therefore, for the reasons set forth in our proposed rule and TSD, as clarified in the responses to comments in this document, we are taking final action to approve certain revisions to the Nevada SIP and to disapprove certain other revisions. With respect to approvals, we are taking final action to approve NAC 445.22083 ("Construction, major modification or relocation of plants to generate electricity using steam produced by burning of fossil fuels") and NAC 445B.250 ("Notification of Director: Construction, reconstruction and initial start-up; demonstration of continuous monitoring system performance"), as re-submitted on August 20, 2007, and NAC 445B.252 ("Testing and sampling"), as submitted on January 12, 2006.⁷ We are also approving the rescission from the applicable SIP of NAQR article 13, subsection 13.1.3(3), i.e., the minor source BACT requirement, and NAC 445.706(2), which relates to payment of fees.

With respect to disapprovals, we are taking final action to disapprove four submitted rules evaluated separately from the bulk of the permitting program (see table 1, above); all of the submitted rules that comprise NDEP's stationary source permitting program (see tables 2 and 4, above); the two statutory

⁷ Final approval of these rules supersedes the following rules in the applicable SIP (superseding rules shown in parentheses) upon the established compliance date for any new or amended requirements in the superseding rules: NAC 445B.22083, as submitted on November 30, 2003 (NAC 445B.22083); NAQR article 2.16.1 (NAC 445B.250); and NAC 445.682 (NAC 445B.252).

provisions listed in table 4; and the rescissions of three existing SIP rules as listed in table 3, above. Our disapproval of these submitted rules, statutory provisions, and rescissions does not trigger sanctions under CAA section 179 and 40 CFR 52.31 because the State of Nevada has an approved stationary source permitting program in the applicable SIP and is not required under the Clean Air Act to submit its updated stationary source permitting program to EPA for approval.⁸

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. We have determined that there is such good cause for making our approval of two rules (i.e., NAC 445B.22083 and NAC 445B.250) and our disapproval of the other rules submitted by NDEP on August 20, 2007 (see table 4, above) final without prior proposal and opportunity for comment because the rules are in substance the same as those that they supersede and for which public notice and comment was provided in our April 17, 2007 proposed rule. Good cause also exists for final disapproval of the two statutory provisions submitted on August 20, 2007 without prior proposal and opportunity for comment because both were adequately described in the April 17, 2007 proposed rule and clearly related to the overall program for which we proposed disapproval and for which we are taking final action to disapprove in this document. Thus, notice and public procedure for our action on the statutory provisions and amended rules contained in NDEP's August 20, 2007 SIP submittal are unnecessary.

V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves or disapproves state law as meeting

Federal requirements and imposes no additional requirements. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves or disapproves state law and does not impose any additional enforceable duty, it 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).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves or disapproves state law implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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 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 June 16, 2008. 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, Lead, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: February 20, 2008.

Wayne Nastri,

Regional Administrator, Region IX.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations 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 DD—Nevada

■ 2. Section 52.1470 is amended by adding paragraphs (c)(18)(i)(A), (c)(25)(vi), (c)(56)(i)(A)(9), and (c)(67) to read as follows:

§ 52.1470 Identification of plan.

* * * * *

(c) * * *

(18) * * *

(i) * * *

(A) Previously approved on April 14, 1981 in paragraph (c)(18)(i) of this

⁸ In this context, we are referring to NDEP's program for issuing pre-construction permits for all new sources and modifications other than those for which part C (i.e., PSD) or part D (i.e., Nonattainment NSR) of title I of the CAA apply.

section and now deleted without replacement: Nevada Air Quality Regulations (NAQR) article 13.1.3(3).

* * * * *

(25) * * *

(vi) Previously approved on March 27, 1984, in paragraph (c)(25)(i)(A) of this section and now deleted without replacement: Nevada Administrative Code (NAC) section 445.706(2).

* * * * *

(56) * * *

(i) * * *

(A) * * *

(9) The following sections of Chapter 445B of the Nevada Administrative Code were adopted on the dates listed in paragraph (c)(56)(i)(A)(9) of this section:

(i) September 18, 2003: 445B.252.

* * * * *

(67) New or amended regulations were submitted on August 20, 2007 by the Governor's designee.

(i) Incorporation by reference.

(A) Nevada Division of Environmental Protection.

(1) Nevada Administrative Code (January 2007 codification by the Legislative Counsel Bureau) section 445B.22083, "Construction, major modification or relocation of plants to generate electricity using steam produced by burning of fossil fuels;" and section 445B.250, "Notification of Director: Construction, reconstruction and initial start-up; demonstration of continuous monitoring system performance;" adopted by the State Environmental Commission on October 4, 2005.

* * * * *

[FR Doc. E8-8139 Filed 4-15-08; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 206

[Docket ID FEMA-2008-0003]

RIN 1660-AA59

Disaster Assistance; Change in Federal Share for Alternate Projects for Public Facilities

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This final rule makes a conforming amendment to the Federal Emergency Management Agency's

(FEMA) Public Assistance regulations to reflect two changes to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act) made by the Security and Accountability For Every Port Act of 2006 (the SAFE Port Act). The first change amends the percentage of the Federal contribution for alternate projects from 75 percent to 90 percent of the Federal share of the Federal estimate of eligible costs for public facilities. The second change removes language that provided for Federal funding of 90 percent of the Federal share of the approved Federal estimate of eligible costs for alternate projects in areas with unstable soil. These changes are technical and conforming amendments that revise FEMA's regulations to conform with amendments to the Stafford Act. FEMA is exercising no discretion in implementing these changes.

DATES: This final rule is effective April 16, 2008.

FOR FURTHER INFORMATION CONTACT:

James A. Walke, Director, Public Assistance Division, Federal Emergency Management Agency, 500 C Street SW., Room 601, Washington, DC 20472, (phone) 202-646-2751; (facsimile) 202-646-3304; or (e-mail) James.Walke@dhs.gov.

SUPPLEMENTARY INFORMATION: Under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act), Public Law 93-288, as amended, 42 U.S.C. 5121-5207, the Federal Emergency Management Agency (FEMA) provides funding to State or local governments or private nonprofit organizations (PNPs) to repair, restore, reconstruct or replace public facilities owned or controlled by the State or local government or PNP. If, however, the State or local government or PNP determines that the public welfare would not best be served by repairing, restoring, reconstructing, or replacing the public facility, it may elect to receive a contribution to use for alternate projects. Any alternate project must either be "to repair, restore, or expand other selected public facilities; to construct new facilities; or to fund hazard mitigation measures that the State or local government determines to be necessary to meet a need for governmental services and functions in the area affected by the major disaster." (42 U.S.C. 5172(c)(1); 44 CFR 206.203(d)(2)).

Section 609 of the Security and Accountability For Every Port Act of 2006 (SAFE Port Act), Public Law 109-347, 120 Stat. 1884, October 13, 2006, amended section 406(c)(1) of the Stafford Act by changing the Federal

contribution for alternate projects for State and local government applicants from "75 percent of the Federal share" of the eligible costs for public facilities to "90 percent of the Federal share" of the eligible costs for public facilities. Accordingly FEMA is revising 44 CFR 206.203(d)(2)(ii) to reflect this statutorily mandated percent share increase for public facilities.

Because Congress made this change for public facilities, but made no change to the 75 percent contribution for private nonprofit applicants' alternate projects, FEMA is adding a new paragraph to separately address the Federal contribution for private nonprofit facilities, which remains at 75 percent.

Section 609 of the SAFE Port Act also struck former section 406(B) of the Stafford Act, which provided for Federal funding of 90 percent of the Federal share of the approved Federal estimate of eligible costs of alternate projects in areas with unstable soil. Because Congress removed this authority from the Stafford Act and because FEMA will already be providing funding of 90 percent of the Federal share of the approved Federal estimate to State and local governments regardless of the stability of the soil through its change to 44 CFR 206.203(d)(2)(ii), FEMA is removing the regulation that implemented section 406(B) at 44 CFR 206.203(d)(2)(iii).

Administrative Procedure Act

Under the Administrative Procedure Act (APA), a notice of a proposed rulemaking is not necessary to revise a regulation if the agency finds for good cause that notice and public procedure are "impracticable, unnecessary, or contrary to the public interest." See 5 U.S.C. 553(b)(3)(B). This rulemaking conforms with the good cause exemption under section 553(b)(B) of the APA because notice and comment is unnecessary and impractical. Public comments would serve no useful purpose, as the revision to the regulation is mandated by the change to FEMA's statutory authority, and FEMA has no discretion to alter this statutory mandate. For these reasons, FEMA also finds that it has good cause not to delay the effective date of this rule under 5 U.S.C. 553(d)(3).

Executive Order 12866, as Amended, Regulatory Planning and Review

FEMA has prepared and reviewed this rulemaking under the provisions of Executive Order 12866, 58 FR 51735, Oct. 4, 1993, and as amended. Under Executive Order 12866, a significant regulatory action is subject to the Office