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

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

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

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

• Does not provide EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

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 action 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 December 17, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: October 3, 2012.

Jared Blumenfeld,

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 F—California

■ 2. Section 52.282 is amended by adding paragraph (f) to read as follows:

§ 52.282 Control strategy and regulations: Ozone.

* * * * *

(f) *Determination of attainment.* EPA has determined that, as of November 19, 2012, the Sacramento Metro 1-hour ozone nonattainment area has attained the 1-hour ozone standard, based upon complete, quality-assured and certified ambient air quality monitoring data for 2007–2009.

[FR Doc. 2012–25547 Filed 10–17–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2012–0566; FRL–9740–3]

Limited Approval and Disapproval of Air Quality Implementation Plans; Nevada; Clark County; Stationary Source Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing a limited approval and limited disapproval of revisions to the Clark County portion of the applicable state implementation plan (SIP) for the State of Nevada. The submitted revisions include new and amended rules governing the issuance of permits for stationary sources, including review and permitting of major sources and major modifications under parts C and D of title I of the Clean Air Act (CAA). The effect of this limited approval and limited disapproval action is to update the applicable SIP with current Clark County permitting rules and to set the stage for remedying certain deficiencies in these rules. This limited disapproval action triggers an obligation on EPA to promulgate a Federal Implementation Plan unless the State of Nevada corrects the deficiencies, and EPA approves the related plan revisions, within two years of the final action, and for certain deficiencies the limited disapproval also triggers sanctions under section 179 of the CAA unless the State of Nevada submits (on behalf of Clark County) and we approve SIP revisions that correct the deficiencies within 18 months of final action.

DATES: *Effective Date:* This rule is effective on November 19, 2012.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2012–0566 for this action. Generally, documents in the docket for this action available electronically at *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 at *www.regulations.gov,* 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). 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, 75 Hawthorne Street (AIR–3), San Francisco, CA 94105, phone number (415) 972–3534, fax number (415) 947–3579, or by email at *yannayon.laura@epa.gov.*

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

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I. Summary of Proposed Action

On July 24, 2012 (77 FR 43206), EPA proposed a limited approval and limited disapproval of revisions to the Clark County portion of the Nevada State Implementation Plan (SIP). The submittals included new and amended regulations governing the issuance of permits for stationary sources under the jurisdiction of the Clark County Department of Air Quality (Clark or DAQ), including review and permitting

of major sources and major modifications under parts C and D of title I of the CAA. Collectively, the submitted regulations (referred to as ''Sections'') comprise DAQ's current program for preconstruction review and permitting of new or modified stationary sources under DAQ jurisdiction in Clark County, including related definitions. These SIP submittals, referred to herein as the ''NSR SIP submittal'' or ''submitted NSR rules,'' represent a comprehensive revision to Clark County's preconstruction review and permitting program. Specifically, EPA proposed a limited approval and limited disapproval of the new and amended Clark County regulations listed in Table 1.

TABLE 1—SUBMITTED NSR RULES

Section No.	Section title	Adopted	Submitted
0	Definitions	3/6/12	5/22/12
12.0	Applicability, General Requirements and Transition Procedures	11/3/09	2/11/10
12.1	Permit Requirements for Minor Sources	11/3/09	2/11/10
12.2	Permit Requirements for Major Sources in Attainment Areas (Prevention of Significant Deterioration).	3/6/12	5/22/12
12.3	Permit Requirements for Major Sources in Nonattainment Areas	5/18/10	9/01/10
12.4	Authority to Construct Application and Permit Requirements for Part 70 Sources	5/18/10	9/01/10

In our proposed rule (77 FR 43206, at 43208), we identified the existing Clark County SIP rules governing NSR for stationary sources as listed in Table 2.

TABLE 2—EXISTING SIP RULES GOVERNING NSR FOR STATIONARY SOURCES UNDER DAQ JURISDICTION

Section No.	Section title	Fed. Reg. citation and EPA approval date
0	Definitions	69 FR 54006, 9/7/04.
1	Definitions (33 terms retained in SIP in 69 FR 54006, 9/7/04)	46 FR 21758, 4/14/81 and 47 FR 26620, 6/21/82.
11	Ambient Air Quality Standards	69 FR 54006, 9/7/04.
12	Preconstruction Review for New or Modified Stationary Sources	69 FR 54006, 9/7/04.
16	Operating Permits	47 FR 26386, 6/18/82.
58	Emission Reduction Credits	69 FR 54006, 9/7/04.
59	Emission Offsets	69 FR 54006, 9/7/04.
NAC 445B.22083	Construction, major modification or relocation of plants to generate electricity using steam produced by burning of fossil fuels..	69 FR 54006, 9/7/04.

As a result of today's final action, all of these rules except for Section 11, NAC section 445B.22083, and portions of Section 1, are replaced in, or otherwise deleted from, the Nevada SIP by the submitted set of rules listed in Table 1. With respect to Section 1, of the 33 terms contained in the Nevada SIP, the following six terms are replaced by revised definitions contained in the submitted NSR rules: (1) ''Air contaminant'' (subsection 1.3); (2) ''minor source'' (subsection 1.50); (3) ''shutdown'' (subsection 1.78); (4) ''significant'' (unnumbered); (5) ''special mobile equipment'' (subsection 1.85); and (6) ''start up'' (subsection 1.89).[1]

[1] Although our proposed rule indicated that all of the Section 1 definitions in the SIP would be replaced by the NSR SIP submission (*see* 77 FR 43206, 43208), EPA has found that only these six definitions in SIP-approved Section 1 were in fact part of the existing SIP rules governing NSR for stationary sources under DAQ jurisdiction. Therefore, in this final rule, we are clarifying that only those Section 1 definitions that pertain to NSR for stationary sources under DAQ jurisdiction and that are in fact superseded, under state law, by revised Clark County definitions in the submitted NSR rules, are being replaced in the Nevada SIP.

The most significant deficiencies that we identified in the submitted NSR rules, as discussed in detail in the TSD, are generally as follows: (1) The absence of minor NSR provisions that ensure protection of the 2006 $PM_{2.5}$ NAAQS and 2008 Lead (Pb) NAAQS; (2) minor NSR applicability provisions that do not cover stationary sources of $PM_{2.5}$; (3) deficiencies in the definitions of certain terms used in PSD and Nonattainment NSR (NNSR) applicability determinations; (4) definition of ''regulated NSR pollutant'' that does not adequately address PSD and NNSR requirements for regulation of condensable particulate matter; (5) deficiencies in the criteria for assessing the quality (or ''integrity'') of emission reduction credits used to satisfy NNSR offset requirements; and (6) the absence of minor NSR or NNSR provisions to ensure that the air quality impacts of stationary sources are not underestimated due to stack heights that exceed good engineering practice or unacceptable air dispersion modeling techniques. We identified these as the ''most significant'' deficiencies because these are the most likely to affect pollutant emissions within Clark County, compared to other deficiencies that we do not expect would significantly affect emissions levels (e.g., administrative requirements for permit issuance).

We proposed to approve SIP revisions that exclude certain insignificant/de minimis activities from minor source permitting requirements in the Clark County portion of the Nevada SIP. Under the Clark County rules that we proposed to approve, some of these insignificant/de minimis activities must continue to comply with many of the requirements that would apply to sources needing to obtain preconstruction permits. We received no comments on our proposed approvals and are finalizing those approvals as consistent with 40 CFR 51.160(e).

II. Public Comment on Proposed Action

EPA's proposed action provided a 30-day public comment period. During this period, we received two comment letters, one from the Nevada Division of

Environmental Protection (NDEP), dated September 7, 2012, and one from the Clark County Department of Air Quality (Clark or DAQ), dated September 6, 2012. We summarize and provide responses to these comments below.

Comment 1: Clark County disagreed with EPA's statement that the applicability provisions in Section 12.1 are deficient with respect to regulation of $PM_{2.5}$ precursor emissions and stated that Section 12.1 addresses each of the pollutants identified by EPA as $PM_{2.5}$ precursors (NO_X, SO_2, and VOCs). In addition, Clark County asserted that $PM_{2.5}$ emissions are a subset of PM_{10} emissions, which Section 12.1 also addresses. Clark County stated that ''[a]lthough defining precursors to $PM_{2.5}$ more explicitly might clarify the rule, the county believes the rule currently provides sufficient authority to regulate sources of these pollutants * * *.''

EPA Response: We disagree. Section 110(a)(2)(C) of the CAA requires, among other things, that each state have a permit program to provide for regulation of the construction and modification of minor stationary sources within the areas covered by the plan as necessary to assure that the NAAQS are achieved. Under EPA's implementing regulations in 40 CFR 51.160–51.164, these permit programs must contain enforceable procedures that enable the permitting authority to determine whether the construction or modification of a stationary source will result in (1) a violation of applicable portions of the control strategy; or (2) interference with attainment or maintenance of a NAAQS in the State in which the proposed source (or modification) is located or in a neighboring State, and procedures for preventing any such construction or modification. For purposes of implementing the 1997 $PM_{2.5}$ NAAQS, as explained in our TSD, States were required by EPA's 2008 New Source Review implementing regulations for the 1997 $PM_{2.5}$ NAAQS (''$PM_{2.5}$ NSR Implementation Rule'') to revise their minor source programs to include direct and condensable $PM_{2.5}$ emissions and $PM_{2.5}$ precursor emissions in the same manner as included for purposes of $PM_{2.5}$ major NSR. *See* TSD at 16 (citing 73 FR 28321 at 28344, May 16, 2008).

Clark County's minor NSR program in Section 12.1 generally defines ''minor source'' as a stationary source that is not a major source and that has a potential to emit equal to or greater than specified levels for the following seven pollutants: PM_{10}, CO, VOC, NO_X, SO_2, Lead (Pb), and H2S. *See* Section 12.1, subsection 12.1.1 (a) and (c) (definitions). Similarly, for purposes of regulating modifications at minor sources, Section 12.1 establishes ''significant'' emission levels for these same seven pollutants and for Total Reduced Sulfur. *Id.* at subsection (g). These provisions are not adequate for purposes of implementing the $PM_{2.5}$ NAAQS for three reasons.

First, the provisions do not explicitly regulate sources of direct $PM_{2.5}$ emissions. Second, the provisions do not address the condensable fraction of $PM_{2.5}$ or $PM_{10,}$ which is required to be accounted for in permitting actions on or after January 1, 2011. 73 FR 28321 at 28334 (May 16, 2008) (''Because condensable PM emissions exist almost entirely in the 2.5 micrometer range and smaller, these emissions are inherently more significant for $PM_{2.5}$ than for prior PM standards addressing larger particles''); *see also* 75 FR 80118 (December 21, 2010) (final rule establishing methods for measurement of filterable and condensable PM_{10} and $PM_{2.5}$ emissions from stationary sources). Third, the provisions do not adequately address $PM_{2.5}$ precursors. Although we agree with Clark County that these applicability provisions cover sources of $NO_{X,}$ SO_2, and VOCs, which pollutants the EPA has defined as precursors to $PM_{2.5}$, those applicability provisions in themselves do not ensure that emissions of the appropriate pollutants will be addressed as $PM_{2.5}$ precursors in the minor source program in the same manner as included for purposes of $PM_{2.5}$ major NSR.

In response to our proposed disapproval of Section 12.1 with respect to the requirements for $PM_{2.5}$, Clark asserted that the provisions governing PM_{10} emissions in Section 12.1 provide sufficient authority to regulate sources of direct $PM_{2.5}$ emissions. We disagree with this assertion, particularly to the extent that Clark County may be suggesting that PM_{10} is an effective surrogate for $PM_{2.5}$ in all cases. Effective May 16, 2011, EPA ended the states' ability to use, as a matter of policy, evaluation of PM_{10} (including the PM_{10} NAAQS) as a surrogate for evaluation of $PM_{2.5}$ in Prevention of Significant Deterioration (PSD) permitting actions, as had previously been allowed pursuant to a 1997 guidance document entitled ''Interim Implementation for the New Source Review Requirements for $PM_{2.5}$,'' October 23, 1997 (''PM_{10} Surrogate Policy'').[2] 76 FR 28646 (May 18, 2011). EPA terminated the use of the 1997 PM_{10} Surrogate Policy in PSD permitting programs based on the Agency's conclusion that the necessary technical tools to conduct $PM_{2.5}$ analyses for PSD sources had become available and that it was therefore no longer appropriate to rely on the PM_{10} Surrogate Policy to protect the $PM_{2.5}$ NAAQS. *Id.* at 28648. Thus, PSD permit applications must now be reviewed directly against the $PM_{2.5}$ requirements. *Id.* at 28647. For these same reasons, we conclude that it is not appropriate for Clark County to rely categorically on the PM_{10} provisions in Section 12.1 to satisfy the requirements of CAA section 110(a)(2)(C) with respect to the 1997 or 2006 $PM_{2.5}$ NAAQS. Consistent with EPA's end to the use of the PM_{10} Surrogate Policy for PSD permit programs, minor NSR permit programs under CAA section 110(a)(2)(C) must require owners and operators of sources and permitting authorities to conduct permit-related $PM_{2.5}$ analyses and may not allow the automatic use of PM_{10} analysis as a surrogate for satisfying $PM_{2.5}$ requirements.

In sum, Section 12.1 does not contain enforceable procedures that enable Clark County to determine whether the construction or modification of a stationary source of direct $PM_{2.5}$ emissions and any emissions of $PM_{2.5}$ precursors will result in either a violation of an applicable control strategy or interference with attainment or maintenance of the 1997 or 2006 $PM_{2.5}$ NAAQS, nor does the rule contain enforceable procedures for preventing construction or modification of such sources, as required by CAA section 110(a)(2)(C) and 40 CFR 51.160–51.164. Consequently, we are disapproving Section 12.1 with respect to the requirement in CAA section 110(a)(2)(C) to regulate the construction and modification of stationary sources of $PM_{2.5}$ emissions as necessary to assure that the 1997 and 2006 $PM_{2.5}$ NAAQS are achieved.

Comment 2: Clark County disagreed with EPA's proposal to disapprove language regarding federal enforceability in subsection 12.1.3.6(a)(5) and stated that it ''could find no language [in the CAA or EPA regulations] that explicitly prohibits an applicant from specifying or declaring anything it deems appropriate in the information it submits.'' Referencing an EPA guidance document addressing CAA title V (Part 70) permitting issues,

[2] The preamble to EPA's $PM_{2.5}$ NSR Implementation Rule provided that States with SIP-approved PSD programs could continue to implement the program for particulate matter less than 10 micrometers (PM_{10}) as a surrogate for meeting the PSD program requirements for $PM_{2.5}$ pursuant to the PM_{10} Surrogate Policy. See 73 FR at 28341. As confirmed in a May 18, 2011 rulemaking, however, EPA has ended the use of this policy both under the Federal PSD program and in SIP-approved PSD program areas. *See* 76 FR 28646 (May 18, 2011).

Clark County stated that ''EPA indicated some precedent for declaring which of the conditions of an 'authority to construct or operate' permit would be federally enforceable within the context of a Part 70 Operating Permit application.'' The County asserted that EPA's authority to disapprove a state's minor source program is extremely limited and that EPA may only disapprove such programs under CAA section 110(a)(2)(C) if they ''interfere with attainment of the NAAQS or other applicable requirements of the Act.'' Clark County stated its belief that ''there can be provisions and conditions in minor source permits that do not pertain to SIP requirements, nor otherwise relate to any of the requirements of the Act,'' such as requirements addressing noxious odors and public nuisances. Clark County stated that it had intended to ''separately incorporate these conditions into a minor source permit without submitting the conditions, nor the mechanism for their adoption, as part of the SIP permit program,'' and that such conditions should not be subject to federal enforcement or citizen suits under CAA section 113 or 304.

EPA Response: We agree with the County that nothing in the CAA or EPA regulations prohibits a state from issuing permits for minor stationary sources containing requirements that are enforceable only under state law, and we understand that the County's intention may have been to use minor NSR permits issued pursuant to Section 12.1 both for purposes of implementing the SIP-approved minor NSR program and for purposes of implementing other state/local requirements not approved into the SIP. We are disapproving subsection 12.1.3.6(a)(5), however, because the current text of this provision is significantly misleading to the regulated community and the public with respect to EPA's enforcement authorities under the CAA, and because Section 12.1 as a whole does not provide a reliable mechanism for distinguishing between federally-enforceable permit conditions and state-only enforceable permit conditions, as explained further below.

Under the CAA and EPA's implementing regulations, all limitations and conditions in a permit issued pursuant to SIP-approved regulations, including SIP-approved minor NSR permit programs, are federally enforceable under the Act. *See* CAA 113(a)(1), (3), 42 U.S.C. 7413(a)(1), (3); 40 CFR 52.21(b)(17) (defining ''Federally enforceable'' to include ''any permit requirements established * * * under regulations approved pursuant to 40 CFR part 51, subpart I''); 40 CFR 52.23 (''Failure to comply with * * * any permit condition * * * issued pursuant to approved or promulgated regulations for the review of new or modified stationary or indirect sources * * * shall render the person or governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act.''); *see also* 54 FR 27274, 27282 (June 28, 1989) (noting that all construction permits issued under regulations approved pursuant to 40 CFR 51.160–165 are federally enforceable). Such permit conditions are also enforceable by citizens under CAA section 304 of the CAA. 42 U.S.C. 7604(a)(1), (f)(4) (authorizing citizen suit for violation of ''an emission standard or limitation under [the Act],'' including any ''standard, limitation, or schedule established under any permit issued * * * under any applicable State implementation plan approved by the Administrator. * * *''). Thus, upon EPA's approval of Section 12.1 into the Clark County portion of the Nevada SIP, all of the terms and conditions of a permit issued under Section 12.1 are enforceable by the Administrator under CAA section 113 and by citizens under CAA section 304.

By contrast, title V operating permits may contain permit conditions that are not federally enforceable. Specifically, EPA's regulations to implement the operating permit program in title V of the CAA allow states to issue operating permits containing terms and conditions that are not federally enforceable, provided those terms and conditions are specifically identified as such in the permit. *See* 40 CFR 70.6(b)(2) (''Permit content'') (''the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements''). These regulations in 40 CFR part 70, however, apply to state operating permit programs submitted to meet the requirements of title V of the CAA; they do not apply to preconstruction review permit programs submitted to meet the requirements of section 110(a)(2)(C) of the Act, which are, instead, subject to EPA's regulations for review of new sources and modifications in 40 CFR part 51, subpart I. We note that although EPA does not require states to submit title V operating permit programs for SIP approval, states may choose to do so, *e.g.,* to provide a mechanism for establishing federally enforceable permit limits that enable otherwise major sources to avoid PSD or Nonattainment NSR (also known as ''synthetic minor'' permit limits). Once a state operating permit program is approved by EPA and incorporated into the applicable SIP under section 110 of the Act, all terms and conditions contained in a permit issued pursuant to such a program are considered federally enforceable. 40 CFR 52.21(b)(17) and 52.23; *see also* 54 FR 27274 at 27281, 27284 (June 28, 1989).

Subsection 12.1.3.6(a)(5) of Clark County's minor NSR rule states that a permit applicant may, at its option, include in its application ''a declaration that it wants the entire permit, or specifically identified permit conditions or applicable requirements, to be federally enforceable.'' On its face, this language allows a permit applicant to identify those permit conditions for which the applicant ''wants'' a federally enforceable requirement, without regard to whether the conditions so identified (or not identified) derive from SIP-approved requirements or state-only requirements. At minimum, this provision is misleading to the regulated community and the public because it suggests that an applicant may request, and that Clark County may issue, permit conditions limiting federal enforcement authority with respect to permit conditions that derive from SIP-approved requirements in Section 12.1. Given that all conditions of a permit issued pursuant to a SIP-approved program are enforceable under sections 113 and 304 the Act, and that permit conditions deriving only from state law are not federally enforceable, it is not appropriate to suggest that permit applicants have such an undefined ''option.''

We recognize, however, that Clark County may have intended to use minor NSR permits issued under Section 12.1 to implement not only the substantive requirements of Section 12.1, all of which are federally enforceable upon SIP approval, but also to implement requirements in other state regulations not submitted for SIP approval—*e.g.,* conditions addressing noxious odors or public nuisances as defined under state law. To the extent that this was the County's intent, we recommend that the County add separate provisions to Section 12.1 that authorize the County to include ''state-only'' terms and conditions in a minor source permit issued pursuant to Section 12.1, provided those terms and conditions and the state/local requirements that they implement are specifically identified in the permit. In this case, Clark County may provide permit applicants the option of identifying

such requirements as ''state-only'' requirements, provided the rule clearly limits the option to those state-only requirements. For example, subsection 12.1.3.6(a)(5) could be revised to read as follows:

At the option of the applicant, an application may identify for the Control Officer's consideration those permit conditions that do not derive from requirements of the Clean Air Act or regulations approved into the applicable Nevada SIP and that the applicant believes should, therefore, be identified in the permit as conditions enforceable only under state law.

Comment 3: Clark County questioned EPA's proposal to disapprove the County's definition of ''baseline actual emissions'' (BAE) in Section 12.2 and Section 12.3 in several respects. First, the County asserted that with respect to existing electric utility steam generating units (EUSGUs), notwithstanding its use of the phrase ''as of the particular date'' in its definition of BAE, its definition is at least as stringent as the corresponding federal regulation because EPA's regulations ''contain no requirement for any adjustment of compliant emissions whatsoever'' for EUSGUs. Second, the County recognized that its definition differed from EPA's definition of BAE for existing emission units other than EUSGUs (*i.e.,* non-EUSGUs) but stated that this difference was intentional and necessary because ''EPA does not interpret or implement the definition [of BAE] consistent with its plain meaning.'' Quoting from EPA's explanation, in the preamble to EPA's 2002 final rule promulgating this definition (67 FR at 80197, December 31, 2002), of the meaning of the term ''current'' in the context of evaluating a contemporaneous emissions change for netting purposes, Clark County asserted that it ''implements its rule in the same manner EPA does'' and that ''rather than codifying rule language inconsistent with this interpretation, the county has adopted rule language consistent with both its own interpretation and practice and EPA's interpretation and practice.''

EPA Response: We understand that Clark County's definition of BAE reflects an attempt to clarify the methodology for calculating BAE and, in response to the County's comments, we are approving the County's definitions of this term, with one narrow exception discussed below. We remain concerned, however, about ambiguities in the terms and strongly recommend that the County revise the definitions at the next opportunity to ensure that modifications at existing sources are subject to clear and consistent criteria for calculating BAE.

Under EPA's PSD and NSR applicability provisions for ''major modifications,'' both the assessment of whether a ''significant emissions increase'' has occurred (step 1 of the applicability analysis) and the assessment of creditable emissions increases or decreases which occurred during a prior ''contemporaneous'' period (step 2 of the applicability analysis) require calculation of ''baseline actual emissions'' (BAE). *See* 40 CFR 51.165(a)(2)(ii)(B) and 51.166(a)(7)(iv)(*b*) (procedures for calculating emissions increases; 40 CFR 51.165(a)(1)(vi) and 51.166(b)(3)(i) (definition of ''net emissions increase''). Thus, a calculation of BAE is required both for the project under review and for any previous (''contemporaneous'') changes that resulted in creditable emissions increases or decreases. In both cases, EPA's definition of BAE requires adjustments to the emission calculations to ensure that any emissions exceeding certain applicable requirements are not included in calculating the BAE.

Generally, for existing emission units, BAE is defined as ''the average rate, in tons per year, at which the unit actually emitted [a regulated NSR] pollutant'' during any consecutive 24-month period selected by the owner or operator within a 5-year or 10-year period immediately preceding the date that actual construction begins, depending upon the type of unit being modified and with limited exceptions. 40 CFR 51.165(a)(1)(xxxv) and 51.166(b)(47). For any existing emissions unit other than an electric utility steam generating unit (*i.e.,* any existing ''non-EUSGU''), EPA's definition of BAE requires, among other things, that the average emissions rate ''be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply, had such major stationary source been required to comply with such limitations during the consecutive 24-month period.'' 40 CFR 51.165(a)(1)(xxxv)(B)(*3*) and 51.166(b)(47)(ii)(*c*). The purpose of this requirement is to ensure that any emissions that are not allowed under any legally enforceable limitations and that apply at the time of the project are not counted as part of BAE. *See* 67 FR 80186, 80195 (December 31, 2002) (source owners/operators must ''identify the most current legally enforceable limits on your emissions unit'' and ''[i]f these legally enforceable emission limitations and operating restrictions are more stringent than those that applied during the 24-month period, you must adjust downward the average annual emissions rate that you calculated from the consecutive 24-month period to reflect these current restrictions''); *see also* 67 FR at 80201 (''The approach that we have adopted allows you to reference plant capacity that has actually been used, but not pollution levels that are not legally allowed at the time the modification is to occur.'').

For the calculation of BAE in step 1 of the applicability analysis for a modification at an existing non-EUSGU, the reference to emission limitations with which the source ''must currently comply, had [the] source been required to comply with such limitations during the consecutive 24-month period,'' is in reference to only one point in time—*i.e.,* when the project under review occurs. Thus, if the average emission rate calculated for the selected 24-month period [3] exceeds an emission limitation that applies at the time the project under review occurs, the past emissions in excess of that current emission limitation must be excluded from the calculation of BAE for the project under review. *See* 67 FR 80186 at 80195, 80201.

For the netting methodology in step 2 (*i.e.,* for purposes of calculating creditable increases and decreases in emissions from changes that are ''contemporaneous'' with the project under review), the term ''current'' may have multiple defining points, depending on the number of ''contemporaneous'' changes being evaluated. EPA explained the meaning of ''current'' in the context of a netting analysis for an existing non-EUSGU in the preamble to the final rule promulgating sections 51.165(a)(1)(xxxv)(B)(*3*) and 51.166(b)(47), as follows:

Although we are not changing our definition of ''contemporaneous,'' today's action allows existing [non-EUSGUs] to calculate the [BAE] for each contemporaneous event using the 10-year look back period. That is, you can select any consecutive 24-month period during the 10-year period immediately preceding the change occurring in the contemporaneous period to determine the [BAE] for each creditable emissions change. Generally, for each emissions unit at which a

[3] For a non-EUSGU, this may be any consecutive 24-month period ''within the 10-year period immediately preceding either the date the owner or operator begins actual construction of the project, or the date a complete permit application is received by the reviewing authority for a permit required either under this section or under a plan approved by the Administrator, whichever is earlier, except that the 10-year period shall not include any period earlier than November 15, 1990.'' 40 CFR 51.165(a)(1)(xxxv)(B) and 51.166(b)(47)(ii).

contemporaneous emissions change has occurred, you should use the 10-year look back period relevant to that change [footnote omitted]. When evaluating emissions increases from multi-unit modifications, if more than one emissions unit was changed as part of a single project during the contemporaneous period, you may select a separate consecutive 24-month period to represent each emissions unit that is part of the project. In any case, the calculated [BAE] for each emissions unit must be adjusted to reflect the most current emission limitations (including operational restrictions) applying to that unit. ''Current'' in the context of a contemporaneous emissions change refers to limitations on emissions and source operation that existed just prior to the date of the contemporaneous change.

67 FR 80186, 80197 (December 31, 2002).

Thus, for each ''contemporaneous'' change that is considered in a netting analysis, the reference in sections 51.165(a)(1)(xxxv)(B)(*3*) and 51.166(b)(47)(ii)(*c*) to emission limitations with which the source ''must currently comply, had [the] source been required to comply with such limitations during the consecutive 24-month period,'' is in reference to requirements that applied just before the date of the particular ''contemporaneous'' change. As with those ''current'' emission limits that must be reflected in the BAE for the project under review, those emission limits that applied to a particular unit just before it underwent a prior ''contemporaneous'' change (*i.e.,* the most ''current'' applicable requirements at the time of the change) must be reflected in the BAE for that particular change before any emissions increases or decreases associated with it may be credited in the netting analysis.

Clark County's definitions of BAE for non-EUSGUs in Section 12.2 and 12.3 require downward adjustments in average emission rates to exclude emissions that exceed applicable emission limitations but use the phrase ''the particular date'' instead of ''currently'' to define the point in time that governs the identification of applicable emission limitations. *See* Section 12.2, subsection 12.2.2(c)(1)(B)(i) and (2)(D); Section 12.3, subsection 12.3.2(c)(1)(C) and (2)(D). Specifically, the County's definitions of BAE require downward adjustments to average emission rates to ''exclude any emissions that would have exceeded an emission limitation with which the major stationary source must comply *as of the particular date,* had such major stationary source been required to comply with such limitations during the consecutive 24-month period.'' *Id.* (emphasis added).[4] These definitions also contain a sentence providing further direction on the calculation of BAE only for contemporaneous projects, as follows: ''For the purposes of determining [BAE] for contemporaneous changes pursuant to [the definition of NEI], the particular date is the date on which the particular change occurred.'' *Id.* Although these provisions differ from the language in EPA's definition of BAE in 40 CFR 51.165(a)(1)(xxxv)(B) and 51.166(b)(47)(ii), the language is generally consistent with EPA's interpretative statements in the preamble to the 2002 rulemaking, as discussed above, and we understand the County intends to implement these provisions consistent with those EPA interpretations. Thus, we are approving the definitions, with one narrow exception for what appears to be a drafting error in the definition of BAE for non-EUSGUs in subsection 12.2.2(c)(2)(D), as discussed further below. However, we strongly encourage the County to clarify the meaning of the phrase ''the particular date'' for purposes of calculating BAE both for the project under review (step 1) and for any contemporaneous changes pursuant to the definition of NEI (step 2). We recommend that the County provide such a clarification in the regulatory text itself, so that the definition is clear on its face and consistent with EPA's interpretative statements in the preamble to the final rule promulgating these definitions (67 FR 80186).

Alternatively, Clark County may adopt BAE definitions that track EPA's regulatory language in 40 CFR 51.165(a)(1)(xxxv)(B)(*3*) and 51.166(b)(47)(ii)(*c*). Although we recognize that EPA's regulatory text does not specify the meaning of ''currently'' in the context of assessing either the project under review or prior contemporaneous changes, EPA provided an interpretation of this term in the preamble to the 2002 rulemaking (67 FR 80186).

With respect to Clark County's definition of BAE for non-EUSGUs in subsection 12.2.2(c)(2)(D), we are disapproving this provision because the definition is internally inconsistent and confusing. Subsection 12.2.2(c)(2)(D) uses language consistent with EPA's definition in the first sentence (''The average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply had such [source] been required to comply with such limitations during the consecutive 24-month period''), but refers, in the second sentence, to language that deviates from EPA's definition without explanation (''For the purposes of determining the baseline actual emissions for contemporaneous changes pursuant to paragraph (ii)(1)(B) of the definition of [NEI], the particular date is the date on which the particular change occurred''). This internal inconsistency is problematic, as neither the regulatory text nor any supporting analysis associated with this rulemaking explains whether/how the phrase ''the particular date'' in the second sentence informs the phrase ''currently comply'' in the first sentence of subsection 12.2.2(c)(2)(D). Although we recognize that this may simply be a drafting error and that Clark County may have intended to use the phrase ''as of the particular date'' in this provision, we are disapproving the provision because on its face it is confusing and raises enforceability concerns.

Comment 4: Clark County questioned EPA's proposal to disapprove the definition of ''net emissions increase'' (NEI) in Section 12.2 and strongly disagreed, in particular, with the statement in EPA's TSD that EPA's regulatory definition of NEI ''does not call for any assessment of actual emissions after a contemporaneous project.'' The County stated that the federal definition of NEI expressly requires that NEI be calculated using the difference between baseline actual emissions before a contemporaneous project and the new level of actual emissions resulting from that project and asserted that ''[t]he only sensible interpretation of the phrase 'new level of actual emissions' in this context is 'the actual emissions after the contemporaneous project.' '' The County suggested that EPA clarify what it means by ''does not call for any assessment of actual emissions after a contemporaneous project.''

EPA Response: EPA agrees that our explanation of this issue in our TSD was not entirely accurate or clear. For example, our statement that EPA's definition of ''net emissions increase'' (NEI) ''does not call for any assessment of actual emissions after a contemporaneous project'' was incorrect. As the County correctly notes, for purposes of identifying creditable increases and decreases in emissions occurring prior to the particular physical or operational change under review, during a period that is ''contemporaneous'' with that particular

[4] Subsection 12.2.2(c)(2)(D) does not contain this language and instead contains language tracking EPA's definition in 40 CFR 51.166(b)(47)(ii)(*c*), but this appears to be a drafting error, as discussed further below.

change, EPA's definition of NEI requires an assessment of ''baseline actual emissions'' before and ''actual emissions'' after the prior ''contemporaneous'' project. *See, e.g.,* 40 CFR 51.166(b)(3)(vi)(*a*) (''[a] decrease in actual emissions is creditable only to the extent that: (*a*) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions * * *.''). However, although we understand that Clark County's definition of NEI reflects an attempt to clarify the term, we are disapproving it because the County has not demonstrated that its definition is more stringent than or at least as stringent in all respects as EPA's corresponding definition. *See* 40 CFR 51.165(a)(1), 51.166(a)(7)(iv). Specifically, the definition of NEI in Section 12.2 is deficient because it does not establish an appropriate method for calculating the ''actual emissions'' after a previous contemporaneous project, as explained further below, and the substantively identical definition of NEI in Section 12.3 is also deficient for the same reasons.

Under EPA's PSD and NSR regulations, a determination as to whether a significant emissions increase is a ''major modification'' requires a determination as to whether the change has resulted in a significant ''net emissions increase.'' *See* 40 CFR 51.165(a)(1)(v) and 51.166(b)(2) (defining ''major modification''); 40 CFR 51.165(a)(1)(vi) and 51.166(b)(3) (defining NEI). EPA's definition of NEI in 40 CFR 51.165(a)(1)(vi) and 51.166(b)(3), in turn, requires a calculation of all creditable increases and decreases which occurred during a previous period that is ''contemporaneous'' with the particular project under review. The definition of NEI requires that ''[b]aseline actual emissions for calculating increases and decreases'' associated with a contemporaneous project be determined as provided in EPA's definition of ''baseline actual emissions'' (40 CFR 51.165(a)(xxxv) and 51.166(b)(47)), with limited exceptions. *See* 40 CFR 51.165(a)(1)(vi)(A)(*2*) and 51.166(b)(3)(i)(*b*).

EPA's definition of NEI does not specify how the actual emissions after (*i.e.,* resulting from) a prior contemporaneous project must be calculated. *Id.* Importantly, however, for purposes of determining creditable increases and decreases in a netting evaluation, EPA's definition of NEI provides that paragraphs 40 CFR 51.165(a)(1)(xii)(B) and 51.166(b)(21)(ii)[5] shall not apply in determining post-project actual emissions. Those sections define ''actual emissions'' based on actual operating hours, production rates, and types of materials processed, stored, or combusted during a previous 24-month period that is ''representative of normal source operation.'' *See* 40 CFR 51.165(a)(1)(vi)(G) and 51.166(b)(3)(viii). Thus, only ''source-specific allowable emissions'' or ''potential to emit'' may be used to calculate the actual emissions after (*i.e.,* resulting from) a prior contemporaneous project in the netting analysis. *See* 40 CFR 51.165(a)(1)(xii)(C), (D) and 51.166(b)(21)(iii), (iv). EPA regulations specifically provide that the ''actual emissions'' of an emissions unit that has not begun operations as of a particular date must be equal to its ''potential to emit'' on that date. 40 CFR 51.165(a)(1)(xii)(D) and 51.166(b)(21)(iv) (''For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.'')

Consistent with these regulations, EPA's longstanding policy provides that where a ''contemporaneous'' project ''will affect the normal operations of an existing emissions unit (as in the case of a change which could result in increased use of the unit), 'actual emissions' after the change must be assumed to be equal to 'potential to emit.''' Memorandum dated September 18, 1989, from John Calagni, Director, Air Quality Management Division, to William B. Hathaway, Director, Air, Pesticides, and Toxics Division, ''Request for Clarification of Policy Regarding the 'Net Emissions Increase''' (1989 NEI Policy Memo) at 3 (quoting 40 CFR 52.21(b)(21)(iv)). Alternatively, where ''allowable emissions'' are the same as or less than the ''potential to emit'' for an emissions unit, ''allowable emissions'' may be used to define the ''actual emissions'' of that unit after the change. *Id.*

Finally, with respect to a decrease in actual emissions associated with a contemporaneous change, such decrease is creditable only when three specific criteria are met: (1) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions; (2) it is enforceable as a practical matter at and after the time that actual construction on the particular change begins; and (3) it has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change. 40 CFR 51.165(a)(1)(vi)(E) and 51.166(b)(3)(vi). The second of these three criteria essentially requires the use of ''allowable emissions'' or ''potential to emit'' to define the ''actual emissions'' of a unit after a prior ''contemporaneous'' change in order to credit an associated emissions decrease in the netting evaluation.

The three additional paragraphs contained in the Section 12.2 definition of NEI (under subsection 12.2.2(ii)(1)(C)), which are not included in EPA's definition of NEI in 40 CFR 51.166(b)(3), state as follows:

(i) For the purposes of calculating increases under paragraph (1)(B) of this definition, actual emissions after the contemporaneous project shall be determined as provided in the definition of actual emissions, except as provided in paragraph (1)(C)(iii) of this definition.

(ii) For the purposes of calculating increases under paragraph (1)(B) of this definition, if the Control Officer determines that there is no sufficiently representative time period of actual emissions after a contemporaneous project, pursuant to Section 12.2.2(a)(1), actual emissions after the contemporaneous project shall be determined as provided in the definition of projected actual emissions.

(iii) For the purposes of calculating decreases under paragraph (1)(B) of this definition, actual emissions after the contemporaneous project shall be determined as provided in the definition of actual emissions.

Section 12.2, subsection 12.2.2(ii)(1)(C)(i)–(iii).[6]

These three provisions are inconsistent with EPA regulations and longstanding interpretations, for the following reasons.

[5] These two provisions, which are identical, state as follows: In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a consecutive 24-month period which precedes the particular date and which is representative of normal source operation. The reviewing authority shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

40 CFR 51.165(a)(1)(xii)(B), 51.166(b)(21)(ii).

[6] The applicable definition of ''actual emissions'' in this context is in subsection 12.2.2(a), which contains language identical to EPA's definition of ''actual emissions'' in 40 CFR 51.166(b)(21)(ii). See Section 12.2, subsection 12.2.2 (Definitions) (''Unless the context otherwise requires, the following terms shall have the meanings set forth [in subsection 12.2.2] for the purposes of Section 12.2 * * * .'')

First, subsection 12.2.2(ii)(1)(C)(i) states that for the purposes of calculating creditable increases that are contemporaneous with a particular change, ''actual emissions after the contemporaneous project shall be determined as provided in the definition of *actual emissions*'' with limited exceptions (emphasis added), but it does not prohibit use of ''actual emissions'' as defined in subsection 12.2.2(a)(1) (*i.e.,* using the unit's ''actual operating hours, production rates, and types of materials processed, stored, or combusted during'' a previous 24-month period that is ''representative of normal source operation''). This is problematic because the language defining ''actual emissions'' in subsection 12.2.2(a)(1) is substantively identical to EPA's language defining ''actual emissions'' in 40 CFR 51.166(b)(21)(ii), which as noted above EPA's definition of BAE explicitly prohibits source owners/operators from using for purposes of determining creditable increases and decreases in a netting evaluation. *See* 40 CFR 51.165(a)(1)(vi)(G) and 51.166(b)(3)(viii). For purposes of determining ''actual emissions'' immediately after a contemporaneous physical or operational change, use of this definition of ''actual emissions'' is not appropriate because there is no relevant data regarding operating hours, production rates, and types of materials processed, stored, or combusted. Rather, ''actual emissions'' in this context must be equal to the new or modified unit's ''potential to emit'' (PTE) or ''allowable emissions,'' where allowable emissions are the same as or less than PTE. *See* 40 CFR 51.166(b)(21)(iv) and 1989 NEI Policy Memo at 3.

Second, subsection 12.2.2(ii)(1)(C)(ii) states that ''if the Control Officer determines that there is no sufficiently representative time period of actual emissions after a contemporaneous project, pursuant to Section 12.2.2(a)(1), actual emissions after the contemporaneous project shall be determined as provided in the definition of projected actual emissions.'' [7] As discussed above, for purposes of a netting analysis, EPA regulations require that the ''actual emissions'' following a contemporaneous change be calculated based on PTE or ''allowable emissions,'' not projected actual emissions. 40 CFR 51.165(a)(1)(xii)(C), (D) and 51.166(b)(21)(iii), (iv); *see also* 67 FR 80186, 80191 (December 31, 2002) (noting that the actual-to-projected actual applicability test should be used only for purposes of determining whether a proposed modification results in a significant emissions increase (*i.e.,* step 1 of the applicability analysis) and ''should not be used when determining a source's actual emissions on a particular date as may be used for other NSR-related requirements''). As EPA explained in April 2011, EPA revised the PSD and NNSR rules in 2002 by adding provisions to implement the new ''actual-to-projected-actual'' test for certain projects in step one of the applicability analysis but left the existing regulatory structure in place for implementing step two. *See* letter dated April 4, 2011, from Cheryl L. Newton, Director, Air and Radiation Division, EPA Region 5, to Keith Baugues, Assistant Commissioner, Office of Air Quality, Indiana Department of Environmental Management (2011 NEI Letter) at 3 (citing, *e.g.,* 40 CFR 52.21(a)(2)(iv)(b)).[8] Neither the definition of significant NEI in 40 CFR 51.166(b)(3) nor any of the definitions used to calculate a significant NEI use ''projected actual emissions.'' 2011 NEI Letter at 3.

Finally, subsection 12.2.2(ii)(1)(C)(iii) is substantively identical to subsection 12.2.2(ii)(1)(C)(i), except that it applies to calculating emission decreases instead of increases associated with a contemporaneous change. This provision is problematic because it calls for the use of ''actual emissions'' as defined in 40 CFR 51.166(b)(21)(ii) for purposes of calculating creditable decreases in a netting analysis, which as discussed above is inconsistent with EPA's definition of NEI. *See* 40 CFR 51.166(b)(3)(viii). The use of ''actual emissions'' as defined in section 51.166(b)(21)(ii) for this purpose also conflicts with EPA's criteria in 40 CFR 51.166(b)(3)(vi) for crediting emission decreases associated with a contemporaneous change, because such ''actual emissions'' generally are not enforceable as a practical matter.

For all of these reasons, we are disapproving subsections 12.2.2(ii)(1)(C)(i), (ii), and (iii) in Clark County's definition of NEI, because these provisions are inconsistent with EPA's definition of NEI in 40 CFR 51.166(b)(3) and relevant policy. For the same reasons, we are also disapproving identical language in Clark County's definition of NEI in Section 12.3, subsections 12.3.2(aa)(1)(B)(ii), (iii), and (iv). *See* 40 CFR 51.165(a)(1)(vi)(E) and (G). Clark County may address these deficiencies by adopting language consistent with EPA's prohibition on use of ''actual emissions'' as defined in 51.165(a)(1)(xii)(B) and 40 CFR 51.166(b)(21)(ii), so that the definitions of NEI in both Section 12.3 and Section 12.2 track EPA's corresponding definitions in 40 CFR 51.165(a)(1)(vi) and 51.166(b)(3). Alternatively, should Clark County seek to further clarify the methodology for calculating the emissions increases or decreases resulting from a contemporaneous project, we recommend that the County replace the three paragraphs discussed above with the following language:

> For the purposes of calculating emissions increases or decreases under paragraph (1)(B) of this definition, actual emissions after the contemporaneous project shall be equal to the ''potential to emit'' or ''allowable emissions'' of the project, whichever is lower.

Comment 5: With respect to the Nevada Division of Environmental Protection's (NDEP) obligation to submit NSR SIP revisions meeting the applicable requirements of subpart 2 of part D, title I of the Act, for the portion of Clark County that is designated and classified as ''marginal'' nonattainment for the 1997 8-hour ozone standard, NDEP expressed concern about EPA's suggestion that the State could address the regulatory gap by submitting a revised rule extending the existing construction prohibition in NAC section 445B.22083 to cover the entire Clark County ozone nonattainment area. NDEP stated that such an expansion of the existing construction prohibition is not a viable option given current economic conditions and stated that there are ''two equally obvious and significantly less harmful options'' for addressing this requirement.

First, NDEP emphasized that EPA has made a clean data finding for the 1997 8-hour ozone nonattainment area within Clark County and that the State is awaiting EPA action on Clark County's redesignation request and maintenance plan for this standard. Both NDEP and Clark County urged EPA to take action soon on this redesignation request and maintenance plan.

Second, NDEP stated that it has nonattainment provisions in its SIP and that NDEP ''is not required to adopt a program if it has adequate, equivalent-performing regulatory provisions.'' NDEP stated that EPA has not provided specific guidance on the NSR

[7] We assume that Clark County intended here to reference the definition of ''projected actual emissions'' in subsection 12.2.2(nn) of Section 12.2.

[8] EPA purposefully did not extend the actual-to-projected-actual test to the netting evaluation in step two of the applicability test, because the Agency believed it was ''appropriate [for] projects that will result in a significant emissions increase under step one of the process, and, thus, are more likely to adversely impact air quality, to undergo a more conservative examination using the actual-to-potential methodology under step two of the analysis.'' 2011 NEI Letter at 3.

deficiencies but that NDEP is currently reviewing its nonattainment provisions.

EPA Response: As an initial matter, we note that comments regarding NDEP's NSR obligations with respect to stationary sources under its jurisdiction within the Clark County ozone nonattainment area are outside the scope of today's action on Clark County's NSR SIP submission. Our proposed rule identified this issue not as a current program deficiency but rather as a courtesy to remind the State of upcoming NSR obligations for the 1997 8-hour ozone standard. Given our proposed action on Clark County's NSR SIP submission highlighted this upcoming obligation on NDEP's part, however, we respond below to the State's and Clark County's comments on this issue.

EPA appreciates NDEP's concerns about expanding the existing construction prohibition in NAC section 445B.22083 and agrees that several other options are available to address the State's NSR obligations with respect to ozone precursor emissions from fossil fuel-fired steam-powered power plants within Clark County. First, as both NDEP and Clark County correctly note, in April 2011 the State submitted a redesignation request and maintenance plan for the 1997 8-hour ozone standard, which became complete by operation of law in October 2011. EPA is currently reviewing this submission and commits to work with both agencies to address the State's request for redesignation to attainment. As NDEP correctly notes, EPA determined based on ambient air monitoring data that the ozone nonattainment area within Clark County has attained the 1997 8-hour ozone NAAQS (76 FR 17343, March 29, 2011), which is a prerequisite to redesignation to attainment under section 107(d)(3)(E) of the CAA. A final rule redesignating the Clark County ozone nonattainment area to attainment for the 1997 8-hour ozone NAAQS consistent with section 107(d)(3)(E) of the CAA would eliminate the State's NSR obligations for purposes of the 1997 8-hour ozone NAAQS.

Second, with respect to NDEP's statement that the existing Nevada SIP contains nonattainment provisions and that NDEP is not required to adopt an NSR program if it has adequate, equivalent regulatory provisions, we are aware of several nonattainment NSR provisions in the existing Nevada SIP, including certain provisions in Article 13 of the Nevada Air Quality Regulations (''Point Sources'') and in the Utility Environmental Protection Act in title 58 of the Nevada Revised Statutes. We stand ready to work with NDEP in evaluating the relevant SIP provisions to determine whether they adequately address the State's current NSR obligations with respect to stationary sources under NDEP jurisdiction for the 1997 8-hour ozone NAAQS in Clark County.

III. Final Action

For the reasons provided in our proposed rule and above in response to comments, pursuant to sections 110(k) and 301(a) of the Clean Air Act, EPA is finalizing a limited approval and limited disapproval of new and amended regulations that govern applications for, and issuance of, permits for stationary sources under the jurisdiction of the Clark County Department of Air Quality. Specifically, EPA is finalizing a limited approval and limited disapproval of the new and amended regulations listed in table 1 above as a revision to Clark County portion of the Nevada SIP.

EPA is taking this action because, although we find that the new and amended rules meet most of the applicable requirements for such NSR programs and that the SIP revisions improve the existing SIP, we have also found certain deficiencies that prevent full approval.

Specifically, our limited disapproval of the minor NSR permit program in Section 12.1 is based on the following deficiencies: (1) The absence of a means for determining whether the construction or modification of a stationary source will result in a violation of applicable portions of the control strategy or interference with attainment or maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS and the 2008 Lead NAAQS; (2) inappropriate language regarding federal enforceability of permits issued under Section 12.1; (3) the absence of provisions to ensure that approval of any construction or modification must not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy; (4) inappropriate exemptions for sources identified in a separate rule that is not SIP-approved (Section 12.5); (5) the absence of applicability provisions that cover sources of $PM_{2.5}$ or $PM_{2.5}$ precursor emissions; and (6) the absence of provisions to ensure that the air quality impacts of stationary sources are not underestimated due to stack heights that exceed good engineering practice or unacceptable air dispersion modeling techniques.

Our limited disapproval of the PSD permit program in Section 12.2 is based on the following deficiencies: (1) Definitions for the terms ''allowable emissions,'' ''baseline actual emissions,'' ''net emissions increase,'' ''major modification,'' and ''regulated NSR pollutant'' that are not entirely consistent with EPA's definitions in 40 CFR 51.166; (2) a provision governing adjustment of PALs to incorporate requirements that become effective during the term of a PAL that is not entirely consistent with EPA's requirements; and (3) the absence of provisions to ensure that approval of any construction or modification must not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy.

Finally, our limited disapproval of the nonattainment NSR program in Section 12.3 is based on the following deficiencies: (1) Provisions governing offsets and calculation of emission reduction credits that do not ensure the integrity of offset calculations and that reference a separate rule that is not SIP-approved (Section 12.7) for important criteria governing these calculations; (2) definitions for the terms ''net emissions increase,'' ''major modification,'' and ''regulated NSR pollutant'' that are not entirely consistent with EPA's definitions in 40 CFR 51.165; (3) provisions governing interpollutant trades that do not satisfy EPA's criteria for approval of such trades; (4) the absence of provisions to ensure that the air quality impacts of stationary sources are not underestimated due to stack heights that exceed good engineering practice or unacceptable air dispersion modeling techniques; and (5) the absence of provisions to ensure that approval of any construction or modification must not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy.

The intended effect of this limited approval and limited disapproval action is to update the applicable state implementation plan with current State rules for permitting of stationary sources,[9] and to set the stage for remedying deficiencies in these permitting rules. With respect to those deficiencies that relate to the nonattainment NSR requirements of part D, title I of the Act, mandatory sanctions will apply to the Clark County nonattainment area under section 179 of the Clean Air Act unless Nevada submits, and EPA approves, SIP revisions correcting the deficiencies within 18 months of the effective date of this final rule. *See* 40 CFR 52.31. In addition, this limited disapproval action

[9] Final approval of the rules in table 1 supersedes the rules listed in table 2, above, in the existing Nevada SIP.

triggers an obligation on EPA to promulgate a Federal Implementation Plan addressing the deficient SIP elements unless Nevada submits, and EPA approves, SIP revisions correcting the deficiencies within two years of the effective date of this final rule. We stand ready to work with Clark County to ensure that its upcoming rulemaking processes result in permit programs that fully satisfy CAA requirements.

IV. Statutory and Executive Order Reviews

A. Executive Order 12988, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 128665, entitled ''Regulatory Planning and Review.''

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Reduction Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP approvals or disapprovals under section 110 of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the State is already imposing. Therefore, because this limited approval/limited disapproval action does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that this limited approval/limited disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action takes a limited approval/limited disapproval action on pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will 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, because it merely takes a limited approval/limited disapproval action on State rules implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, 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. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045, because it takes a limited approval/limited disapproval action on State rules implementing a Federal standard.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Population

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this rulemaking. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely takes a limited approval/limited disapproval action on certain State requirements for inclusion into the SIP under section 110 of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it 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.

K. Congressional Review Act

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).

L. Petitions for Judicial Review

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 December 17, 2012. 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, Ozone, Volatile organic compounds, Nitrogen dioxide, Sulfur oxides, Particulate matter, Lead, Reporting and recordkeeping requirements.

Dated: September 28, 2012.

Jared Blumenfeld,

Regional Administrator, Region IX.

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 DD—Nevada

■ 2. In § 52.1470 in paragraph (c), Table 3 is amended by:

■ a. Revising the entry for ''Section 0.''

■ b. Adding in numerical order entries for ''Section 12.0,'' ''Section 12.1,'' ''Section 12.2,'' ''Section 12.3,'' and ''Section 12.4.''

■ c. Removing the entries for ''Section 1 (''Definitions''): Subsection 1.3,'' ''Section 1 (''Definitions''): Subsection 1.50,'' ''Section 1 (''Definitions''): Subsection 1.78,'' ''Section 1 (''Definitions''): [unnumbered],'' ''Section 1 (''Definitions''): Subsection 1.85,'' ''Section 1 (''Definitions''): Subsection 1.89,'' ''Section 12 (excluding subsections 12.2.18 and 12.2.20),'' ''Section 16: Subsections 16.1–16.9,'' ''Section 58'' and ''Section 59 [excluding subsection 59.2 (''Local Offset Requirements'')]''.

§ 52.1470 Identification of plan.

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(c) * * *

TABLE 3—EPA-APPROVED CLARK COUNTY REGULATIONS

County citation	Title/subject	County effective date	EPA approval date	Additional explanation
Section 0	Definitions	5/18/10	[Insert **Federal Register** page number where the document begins], 10/18/12.	Submitted on 5/22/12.
*	*	*	*	*
Section 12.0	Applicability, General Requirements and Transition Procedures.	11/3/09	[Insert **Federal Register** page number where the document begins], 10/18/12.	Submitted on 2/11/10.
Section 12.1	Permit Requirements for Minor Sources.	11/3/09	[Insert **Federal Register** page number where the document begins], 10/18/12.	Submitted on 2/11/10.
Section 12.2	Permit Requirements for Major Sources in Attainment Areas (Prevention of Significant Deterioration).	3/6/12	[Insert **Federal Register** page number where the document begins], 10/18/12.	5/22/12.

TABLE 3—EPA-APPROVED CLARK COUNTY REGULATIONS—Continued

County citation	Title/subject	County effective date	EPA approval date	Additional explanation
Section 12.3	Permit Requirements for Major Sources in Nonattainment Areas.	5/18/10	[Insert **Federal Register** page number where the document begins], 10/18/12.	Submitted on 9/01/10.
Section 12.4	Authority to Construct Application and Permit Requirements For Part 70 Sources.	5/18/10	[Insert **Federal Register** page number where the document begins], 10/18/12.	Submitted on 9/01/10.
*	*	*	*	*

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[FR Doc. 2012–25545 Filed 10–17–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 365, 371, and 375

[Docket No. FMCSA–2012–0322]

FMCSA Policy on the Suspension of Operating Authority for Hostage Load Violations

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of enforcement policy.

SUMMARY: FMCSA provides notice of the Agency's new policy concerning enforcement of its household goods (HHG) motor carrier and broker regulations. FMCSA may take enforcement action when a HHG motor carrier or broker knowingly and willfully fails, in violation of a contract, to deliver or unload at the destination a shipment of HHG for which charges have been estimated and for which payment has been tendered. A motor carrier or broker found holding a HHG shipment hostage may be subject to suspension of registration for a period of not less than 12 months to not more than 36 months.

DATES: This decision is effective October 18, 2012.

FOR FURTHER INFORMATION CONTACT: Brodie Mack, Jr., Commercial Enforcement and Investigations Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, (202) 366–8045; email *brodie.mack@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

The U.S. Department of Transportation (DOT) assumed responsibility for regulating the HHG industry in 1996 from the Interstate Commerce Commission (ICC). Congress terminated the ICC in the ICC Termination Act of 1995 (Pub. L. 104–88, 109 Stat. 803). Consequently, DOT inherited the responsibility of handling consumer complaints regarding deceptive business practices and hostage shipments. In 2000, FMCSA was delegated the responsibility for enforcement of HHG consumer protection in the Motor Carrier Safety Improvement Act of 1999 (MCSIA), Public Law 106–159, 113 Stat. 1748. However, FMCSA lacked the authority to fully address brokers and motor carriers engaged in the practice of holding HHG shipments hostage in violation of a contract. Congress responded by including the ''Household Goods Movers Oversight Enforcement and Reform Act of 2005'' in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU). In SAFETEA–LU, Congress specifically addressed (codified at 49 U.S.C. 14915) the problem of persons, including, but not limited to, brokers and motor carriers, who hold HHG shipments hostage. The statute defines a hostage shipment, establishes civil and criminal penalties, and permits the suspension of the operating authority registration of a motor carrier or broker from 12 to 36 months when it holds a shipment hostage.

Policy

Pursuant to 49 U.S.C. 14915, any person, including a motor carrier or broker, that holds a HHG shipment hostage is subject to a $10,000 civil penalty for each violation. Each day the goods are held hostage may constitute a separate violation. In addition with the publication of this policy statement FMCSA may suspend a broker or motor carrier's registration for a period of not less than 12 months or more than 36 months. The suspension of a carrier's or broker's registration extends to and includes any carrier or broker having the same ownership or operational control as the suspended carrier or broker.

FMCSA may suspend a carrier's or broker's registration upon a determination by FMCSA that the carrier or broker knowingly and willfully failed, in violation of a contract, to deliver or unload at the destination of a shipment of HHG for which charges have been estimated and for which payment has been tendered. Pursuant to 49 U.S.C. 13707(b)(3)(A), payment is tendered when a shipper pays: (1) 100 percent of the charges contained in a binding estimate provided by the carrier; (2) not more than 110 percent of the charges contained in a nonbinding estimate provided by the carrier; (3) or in the case of a partial delivery of the shipment, the prorated percentage of the charges.

FMCSA will take action to suspend a carrier's or broker's registration for hostage load violations in accordance with the procedures in 49 U.S.C. 13905. FMCSA may determine that a hostage load violation has occurred based on the results of an investigation, an Agency determination as stated in a final order, or admission by the motor carrier or broker. FMCSA initiates a proceeding to suspend the carrier's or broker's registration by issuing an order to the carrier or broker to show good cause why the registration should not be suspended in accordance with 49 U.S.C. 13905. The order provides notice of the alleged violation, explains how to submit a written response with supporting documentation, and informs the registered entity that failure to respond and demonstrate good cause will result in suspension of its registration.

The Agency Official who issued the order reviews the registered entity's response. After reviewing the response, the Agency Official issues a written decision and may take one of three actions. First, he or she may enter an order suspending the entity's