RESPONDENT'S EXHIBIT 19

5 of 10 DOCUMENTS

COMMUNITIES FOR A BETTER ENVIRONMENT, Plaintiff, v. CENCO REFINING COMPANY, et al., Defendants.

CASE NO. CV 00-5665 AHM (AIJx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

179 F. Supp. 2d 1128; 2001 U.S. Dist. LEXIS 16249; 53 ERC (BNA) 1552

September 26, 2001, Decided

September 26, 2001, Filed, Entered

DISPOSITION:
[**1] CBE'S MOTION FOR SUMMARY ADJUDICATION AND PERMANENT INJUNCTION DENIED AND CBE'S MOTION FOR PRELIMINARY INJUNCTION GRANTED.

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JUDGES:
A. Howard Matz, United States District Judge.

OPINIONBY:
A. Howard Matz

OPINION:

[*1131] ORDER DENYING CBE'S MOTION FOR SUMMARY [**3] ADJUDICATION AND PERMANENT INJUNCTION AND GRANTING CBE'S MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

This action is before the Court on the motion of Plaintiff Communities for a Better Environment ("CBE") for partial summary adjudication and a permanent injunction, or in the alternative, a preliminary injunction. As described in this Court's June 2001 Order denying defendants' motions to dismiss, CBE alleges that Cenco Refining Company ("Cenco") and the South Coast Air Quality Management District ("SCAQMD") have failed to comply with the Clean Air Act by neglecting to apply New Source Review ("NSR") to Cenco's Santa Fe Springs crude oil refinery.

CBE asserts the following grounds for its motion. n1 First, CBE asserts that Defendants violated the California State Implementation Plan ("SIP") by failing to void the Refinery's Facility Permit when it was transferred to Cenco and when Refinery equipment was altered. CBE argues that if the Permit were properly voided, NSR would apply to the Refinery. Second, CBE asserts that Defendants should have applied NSR to the Refinery under the SIP and the EPA's [**5] Reactivation Policy because the prior Refinery owner permanently shutdown the facility and it has been non-operational for six years. Finally, CBE asserts that Defendants violated several other miscellaneous SIP provisions: Rule 2005(c)(2) requiring that a facility hold sufficient RECLAIM trading credits to offset facility emissions for the first year of operation (FAC Fifth Cause of Action); Rule 210 prohibiting construction without first complying with NSR (FAC Seventh Cause of Action); Rule 210 prohibiting submission of incomplete or inaccurate information - here, failure to submit materials required by NSR - to SCAQMD (FAC Seventh Cause of Action); and Rule 212 requiring a 30 day Public Comment period for grants of permits (FAC Second Cause of Action).

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n1 In its opening motion, CBE asserts first that it has organizational standing to bring this action. Defendant's opposition brief does not challenge CBE's showing. In its prior Order denying Defendants' Motions to Dismiss, this Court stated that "for the guidance of the parties, the Court notes that even if the motions to dismiss were converted to motions for summary judgment, plaintiffs' standing showing would still likely be sufficient." The Court's inclination was based on declarations from CBE members and citizens of the city of Santa Fe Springs stating that they had apprehended chemical odors emanating from the facility. The Court finds that CBE has standing to sue on this basis. Plaintiff's Statement of Uncontroverted Facts 36 (describing declarations of CBE members who have apprehended odors).

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In its motion, CBE seeks summary adjudication of its First, Second, Fourth, Fifth and Seventh Causes of Action (see Proposed Judgment) and

a permanent injunction requiring Cenco and SCAQMD to conduct a public NSR process, including an alternatives analysis, to install BACT prior to commencing operations, to offset its emissions, and ordering SCAQMD to rescind Cenco's facility permit until such time as it completes the NSR process. Alternatively, if the Court finds there are any material facts genuinely at issue, CBE requests a [*1133] preliminary injunction prohibiting Defendants from taking actions in furtherance of construction or operation of the facility and requiring SCAQMD to rescind Cenco's permits pending trial.

Motion, pp. 2-3.

For the reasons set forth below, the Court DENIES CBE's Motion for summary adjudication and a permanent injunction. Defendants have raised triable issues as to all of CBE's claims. Moreover, the Court DENIES CBE's motion for a preliminary injunction based on CBE's claims that either the transfer of the facility permit, standing alone, or the specific alterations to the facility, standing alone, violated the SIP and triggered NSR. However, [**7] the Court finds that CBE has made a showing sufficient to warrant a preliminary injunction on its claim that the Refinery's six year long shutdown, in conjunction with its physical modifications, required NSR for the entire facility; the motion is GRANTED on this ground.

II. FACTS

This case involves a crude oil refinery located at 12345 Lakeland Road, Santa Fe Springs, in southeastern Los Angeles County. Plaintiff's Statement of Uncontroverted Facts ("PSUF") 1. Immediately prior to August 1998, the refinery was owned by Powerine Oil Company. Id. at 2. In June 1995, Powerine wrote SCAQMD that it would be shutting down its refinery beginning the first week in July, 1995. Id at 8. Powerine suspended all refining operations on July 3, 1995 and has not refined crude oil since that date. Id at 9.

In September 1995, Powerine's parent company, Castle Energy, entered into a contract for the sale of the refinery equipment to Kenyen Projects Ltd. Id. at

10; Defendants' Additional Material Facts ("DAMF") 56-57. Under the contract, the refinery equipment would be dismantled and shipped to India. DSUF 11; DAMF 56. Powerine informed certain regulatory authorities that it had sold its refinery [**8] equipment and that the equipment would be dismantled and shipped to India. PSUF 11. In October 1995, Powerine informed SCAQMD that it was "in the process of shutting down the refinery for its ultimate dismantling" and that Powerine's new parent company planned to dismantle the refinery. Id. at 12-13. Also in October 1995, Powerine applied to SCAQMD to obtain Emission Reduction Credits. Id. at 14. Finally, Powerine repeatedly requested suspension of regulatory reporting requirements on the basis that the refinery had suspended operations. Id. at 41.

Powerine's then-Chief Financial Officer declares that although Powerine accepted Kenyen's proposal, Powerine's management disagreed with the Kenyen deal, expressed concerns to Castle that the Kenyen deal was unlikely to be successfully implemented and requested that a deal be reached with another company, Energy Merchant Corporation, so that refining operations could be resumed. Egner Decl. 4-5.

In December 1995, Powerine informed various state entities, including the Los Angeles Regional Water Quality Control Board, that the refinery might be resuming crude oil processing. DAMF 60. It informed the Regional Water Quality Control Board [**9] that Powerine was negotiating with a prospective buyer who "planned to bring the refinery back in operation, and rehire the majority of 350 laid off employees" and "desired to purchase the refinery equipment back from Kenyen Projects Ltd, the firm which purchased the refinery equipment and had been making plans to dismantle the refinery equipment and transport it to India." Christman Decl., Exh.16.

[*1134] In January 1996, Energy Merchant Corporation purchased Powerine's stock, thus divesting Castle Energy of ownership. DAMF 63. Michael Egner and June Christman, the then-Environmental Engineering Manager for Powerine, declare that Powerine "acquired Kenyen's rights to the refinery equipment" in February 1996. Egner Decl. 7; Christman Decl. 8. n2 In February 1996, Powerine submitted a letter to SCAQMD requesting cancellation of its application for Emission Reduction Credits, and stated that Energy Merchant Corporation had "the ultimate goal of operating the refinery again." Christman Decl., Exh.20.

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n2 CBE objects to the declarations on the ground that no contractual agreement has been provided to the Court. The objection is overruled. The "Best Evidence Rule" does not preclude the admission of this evidence, at least not in the absence of a concrete challenge to the factual accuracy of these statements.

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Throughout the period of time crude oil refining was suspended, Powerine kept in force the permits it had secured from other agencies, including the Los Angeles Regional Water Quality Control Board and the Los Angeles County Sanitation District. DAMF 67.

Powerine demolished a 28,000 square foot main office building, a warehouse, truck fuel loading racks, tanks and associated equipment, and sold the property

on which the equipment was located. PSUF 17. It is not clear when this occurred or who owned the facility at the time. In 1997, Powerine informed SCAQMD that it had disconnected all fuel feed lines and disconnected and flanged a process feed line or removed a major component of the process for all RECLAIM sources. Id. at 60.

June Christman declares that from 1995 to 1998, Powerine employed two dozen employees at the facility and did use some equipment at the facility, such as utility, storage, wastewater treatment, stormwater management and emergency equipment. DAMF 68. She also declares that the refinery processed remaining sour water through November 1995; processed butane into isobutane at the refinery from May to August 1996; and resumed refining activity with the reformate [**11] splitter to produce diesel fuel during September 1996, However, in an unrelated lawsuit, the California Supreme Court stated that since 1995, the facility "has not been operated at all, and only a skeleton crew of employees has remained, primarily for environmental compliance and equipment maintenance purposes." *Certain Underwriters at Lloyd's of London v. Superior Court*, 24 Cal. 4th 945, 951 (2001). Moreover, Cenco informed the Securities and Exchange Commission ("SEC") in 1998 that "the refinery has had no operations since July 1995" and that "currently, the refinery has a skeleton staff that oversees the maintenance of its assets, which consist of an oil refinery and related assets." Reply Request for Judicial Notice, Exh.4. Defendants do not dispute that the facility has not refined crude oil since 1995. PSUF 9.

Several times between 1995 and 1998, the SCAQMD Fee Review Committee addressed whether the annual and emission permit fees paid by Powerine regarding its refinery in Santa Fe Springs were current. Each time the Fee Review Committee addressed this question during this period, it concluded that Powerine's permits were either active or, when they expired, [**12] were timely reinstated. DAMF 12. Powerine repeatedly expressed its intent to resume crude oil refining to the District's Fee Review Committee. For example, in a series of letters to the District during the 1996 through 1998 time period, Powerine [*1135] repeatedly explained that it was committed to resuming refining activities. Id. at 13. Due to cash flow constraints, Powerine asked for several extensions of time for pending financing arrangements to be completed. The District granted these requested extensions. Powerine paid its fees as it obtained revenues to do so. On July 31, 1996, Powerine sent a letter to the District's Fee Review Committee, forwarding checks totaling $ 91,235,67, which, when added to Powerine's credit with the District for $ 33,764.33, totaled $ 125,000, the amount of Powerine's second payment for past due fees. Id. at 14. >From July 1995 through July 30, 1998, Powerine paid SCAQMD $ 207,396.08 for its annual permit fees and $ 58,126.75 for emission fees necessary to keep the permits active. Id. at 16. SCAQMD, in a December 17, 1997 letter, informed Powerine that Powerine could allow the permits to expire. The permits would not be permanently revoked if Powerine paid [**13] a 15% penalty within one year. Id. at 16. In a letter to the District dated January 28, 1998, Powerine accepted the District's proposal and allowed its permits to expire subject to the understanding that they could be reinstated upon payment of a 15% penalty within one year. Id. at 17.

In July 1998, Powerine applied to SCAQMD to reactivate its expired permits. Mueller Decl. 3. In August 1998, Cenco formally purchased the refinery from Powerine, PSUF 21. In October 1998, Cenco applied for a change of ownership for Powerine's equipment. On December 29, 1998, SCAQMD reactivated Powerine's

expired permit to operate. PSUF 26. Although the timing is disputed, at some point between October 1998 and January 1999, SCAQMD made Cenco the holder of the refinery facility permit. DAMF 46.

SCAQMD reactivated the facility permit based on its investigation of the facility's operations from 1995-1998, Powerine's efforts to keep its permits alive during that period, and SCAQMD's inspections of refinery equipment in 1998. DAMF 18-25. Regarding the condition of refinery equipment in 1998, CBE proffers a 1998 letter from SCAQMD to Powerine indicating that its inspection "found that several pieces of refinery [**14] equipment were altered, dismantled or removed" and a December 1998 stipulation between Cenco and SCAQMD reciting that inspections "indicated a general state of disrepair of the refinery equipment." PSUF 60-61. CBE also introduces a letter from Cenco to the SEC in 1998 stating that "the Refinery's assets are not in working condition 'as is.' Significant capital improvements and other turnaround costs will be incurred before refining can commence." Reply RJN, Exh.4.

Defendants counter with the declaration of Roger Christopher, the SCAQMD Supervising Air Quality Inspector in the Petroleum and Refinery Unit, who inspected the Powerine refinery on August 7, 1998. He found that the "refinery's equipment was in substantially the same condition as it had been in 1989" and that it was not "so dilapidated that it could not be operated." Christopher Decl. 5; DAMF 23-24. He declares that "the refinery was fully capable of being operated by reconnecting fuel supply lines that provided fuel gas to power refinery equipment and by draining off nitrogen that had been injected into most of the equipment to prevent rust." Christopher Decl., 5, 6. n3 Moreover, none of the equipment at the [*1136] Powerine refinery [**15] had been flanged-off, other than blind flanges on the fuel gas lines, which could be easily removed. Powerine had flanged off the fuel gas lines by removing a piece of piping or a valve and bolting a flange over the open end of the pipe. Blind flanges are often put in place on fuel gas lines for equipment that has been temporarily removed from operation so that the equipment may qualify for less stringent emissions reporting requirements under SCAQMD's RECLAIM program. Christopher Decl., 7.

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n3 CBE objects to Christopher's declaration as improper opinion testimony. This objection is overruled.

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Since purchasing the refinery in August 1998, Cenco has operated a flare, fuel gas system, fire water system, effluent water treatment system, cooling water system, and plant air system. DAMF 70.

Since its purchase, Cenco has applied to SCAQMD, the City of Santa Fe Springs, and the State Water Board for the permits necessary to operate the refinery. PSUF 22. In September 1998, the City issued a conditional use permit to [**16] Cenco that required the refinery to make health and safety modifications to the refinery. Id. at 64; See Exh. J to Mueller Decl. One condition is that Cenco convert the refinery's existing alkylation unit (this unit is "critical to the production of clean, reformulated fuels which meet the requirements of the Clean Air Act," DAMF 66) to an entirely new process called

"modified HF." PSUF 66-67. Moreover, the City required Cenco to use a new Rapid Acid Transfer System in conjunction with the modified HF process. Id at 71. Because the Refinery cannot currently manufacture gasoline in compliance with state regulations, Cenco must make modifications to enable the refinery to manufacture reformulated fuels in compliance with State regulations. Id. at 78.

Cenco has never submitted an alternatives analysis n4 to SCAQMD as described in Rules 2005 and 1303 to SCAQMD, PSUF 111. Cenco has not installed BACT nor has it proposed to install BACT on every emission source at the refinery. Id. at 112.

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n4 Rule 1303(b)(5)(A) defines "alternative analysis" as "an analysis of sites, sizes, production processes, and environmental control techniques for such proposed source and demonstrate that the benefits of the proposed project outweigh the environmental and social costs associated with that project."

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[**17]

Based on its inspectors' audits of the equipment and analysis of other facts it gathered, as well as an analysis of whether the above-discussed facts fall within EPA's Reactivation Policy (see below), the District concluded that some of Powerine's permits could be reactivated consistent with SCAQMD rules and EPA policy. DAMF 30, Mueller Decl., 10, 13 and Exh. E thereto. As to equipment that SCAQMD found to be modified or altered, SCAQMD refused to reactivate permits and required Powerine to undergo NSR before a permits could be issued for such equipment. DAMF 28; Mueller Decl., 10 and Exh. C (August 26, 1998 Letter from SCAQMD to Powerine) and Attachment A thereto (specifying altered, dismantled or removed equipment for which permits could not be reactivated); Christopher Decl., 8, 9 and Exh. 1 and Attachment A thereto.

Based on its inspectors' audit of the equipment at the Powerine refinery, SCAQMD refused to reinstate permits to construct for which Powerine had not initiated construction. CENCO filed permit applications for this equipment as part of the 47 applications it later filed, and the SCAQMD further evaluated them through NSR, DAMF 29; Mueller Decl., 10 and Exh. C thereto. [**18]

[*1137] Of the 47 CENCO Refinery Upgrade Project permit applications, SCAQMD applied NSR only to modifications that were found to increase emissions. Vo Decl., 5-7 and Exh. 11. Apparently, in determining whether equipment increased emissions, SCAQMD looked to a baseline consistent with the facility's emissions before the suspension of operations in 1995. Vo. Decl. Exh. 11.

III. DISCUSSION

A. Alleged Violations of the Clean Air Act

1. The Mere Change of Ownership Did Not Void The Refinery's Permit

SCAQMD Rule 209 provides that:

[a] permit shall not be transferable, whether by operation of law or otherwise, from one location to another, from one piece of equipment to another, or from

one person to another. When equipment which has been granted a permit is altered, changes location, or no longer will be operated by the permittee, the permit shall become void.

In its opening motion, CEE asserts that "on January 15, 1999 SCAQMD transferred Powerine's facility permit to Cenco" and that this transfer of ownership "voids" the permit under Rule 209. Motion, p. 9. However, in its Reply, CBE states that "it was not the mere change in ownership" that violated the Clean Air Act, [**19] "but rather the refinery's shutdown, alteration, deterioration, and Cenco's plans to start operations and construction of a modified refinery." Reply, p.6 (emphasis added).

The Court finds that a more change in ownership of equipment does not void that equipment's permit under Rule 209. The Court instead adopts Defendants' interpretation of the SIP provision: "Rule 209 prevents a permit transfer from one person to another *without applying to the District*." Opposition, p.8.

First, this reading of Rule 209 harmonizes the Rule with other SIP provisions and California statutory law. District Rule 301.1 expressly contemplates revision of permits to reflect changes in ownership:

When an application for change of ownership of a permit to operate or an emission reduction credit certificate is filed within 24 months of the date of transfer, and there has been no change of operation and a permit to operate or an emission reduction credit certificate had previously been granted and has not otherwise expired, n5 the applicant shall pay a filing fee of $ 110 for each permit.

[*1138] Moreover, while District Rule 1303(b) subjects changes in the "method of operation" of equipment to [**20] NSR, Rule 1302 specifically excludes changes in operators from the definition of "changes in the method of operation": "[a] change in the method of operation of equipment, unless previously limited by an enforceable permit condition, n6 shall not include ... a change in the operator of the facility."

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n5 At the hearing, CBE argued that Rule 209 "trumps" Rule 301 such that the meaning of Rule 209 should not be limited by any language in Rule 301. CBE relies on subsection 301(d)(1) which provides that

the Executive Officer shall establish an annual operating fee due date for each permittee for all permits associated with the same premises. Thereafter, All Permits to Operate ... shall be renewable as set forth below, on the annual operating fee due date set by the Executive Officer for all permits associated with the same premises subject to *any other requirements of these rules and regulations or state law, regarding validity, voiding or revocation of permits.*

Although Rule 209 does provide for "voiding" of permits, subsection 301(d)(1) does not mean that Rule 209 cannot be read in light of Rule 301. Instead, subsection 301(d)(1) appears to mean simply that annual permit renewal is not automatic if a permit was invalidated under another rule. The provision by no means precludes the Court from favoring a construction of Rule 209 that is consistent with Rule 301.1's clear endorsement of changes of ownership.

Moreover, CBE's understanding of the relationship between Rule 209 and Rule 301 compels an interpretation of Rule 209 (that it altogether bars changes of ownership) that not even CBE adopts.

CBE asserts that the Refinery's facility permit had previously expired and that there will be a change in operation, making Rule 301.1 inapplicable. However, SCAQMD apparently reactivated the permit before it approved the change in operator. The Court addresses CBE's challenge to the validity of the reactivation elsewhere in this order. The Court also deals with CBE's allegation of a change in operation elsewhere. [**21]

n6 CBE asserts that Rule 209 represents an enforceable permit condition and suggests that Rule 209 does make a mere change in ownership a "change in method of operation." However, Rule 209 provides no such equivalence. Moreover, if Rule 209 did so provide it would nullify the quoted clause from Rule 1302 because a change in ownership would always be a change in method of operation.

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Finally, California Health & Safety Code § 42301(f) provides that an air district's permitting system shall:

provide for the reissuance or transfer of a permit to a new owner or operator of an article, machine, equipment, or contrivance ... However, under no circumstances shall the criteria [for issuing the permits] specify that a change in ownership or operator alone is a basis for requiring more stringent emission controls or operating conditions than would otherwise apply to the article, machine, equipment or contrivance.

These provisions of the SIP, which includes Rule 209, and state law provisions are consistent with Defendants' interpretation of Rule 209 and appear to conflict with a bar to [**22] changes in ownership.

Moreover, Defendants' plain language reading of Rule 209 makes sense. They contend that Rule 209's prohibition against permit transfers without applying to the District serves to "ensure that the District has, at all times, a record of the current owner for notice and citation purposes." Opposition, p.8; Thompson Decl. 4, 8-9; Muller Decl. 4. CBE neither disputes that this represents a sensible explanation of Rule 209's purpose nor proffers any practical justification for interpreting that Rule as a *per se* bar to changes in operators.

Defendants add that CBE's interpretation of Rule 209 would be "unworkable as a practical matter" because "each month, the District processes approximately 150 applications for change of ownership/operator" and the application process is "ministerial"; "if these applications were all subject to NSR, the District's permitting operations would be thrown into chaos." Thompson Decl. 4, 6-7; Mueller Decl. 11. Defendants also assert that "CBE's interpretation would render much equipment throughout the South Coast District valueless"; "the cost of conducting NSR and upgrading the equipment with EACT would in many cases be prohibitive [**23] and require scrapping the equipment instead of selling it." Opposition, p.11; Mueller Decl. 11; Coy Decl. 8.

In light of Rule 209's language, the governing statutory scheme, practical considerations, and CBE's express acknowledgment that "it was not a mere change

in ownership" that required new source review under the Clean Air Act, the Court declines to find that the mere change in owner of the Powerine refinery voided the refinery's permit. n7

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n7 The Court rejects CBE's contention that the EPA's notice of violation to Cenco compels accepting CBE's interpretation of Rule 209. Although the notice of violation did state that "under District Rule 209, the permits became void when Powerine attempted to transfer its permits to Cenco in August 1998," notices of violation are not proof of anything. *See Air California v. United States Dept. of Transportation*, 654 F.2d 616, 620 (9th Cir. 1981) (the only effect of a notice of violation by EPA is to "trigger the statutory mechanism for informal accommodation which precedes any formal enforcement measures"). Moreover, the NOV appears to rely on either a mistaken or different version of Rule 209 than the one enacted into the SIP. The NOV states that Rule 209 provides that "When equipment which has been granted a permit is altered, changes location, *changes ownership* or no longer will be operated by the permittee, the permit becomes void." Exh. C to Kuhn Decl., p.12 (emphasis added). The italicized language is not part of SIP-approved Rule 209. Additionally, the NOV does not mention Rule 301 or attempt to harmonize Rule 209 with other SIP provisions. Next, as Defendants note, EPA has not pursued its initial allegations regarding Rule 209 against Cenco but has instead entered into a stipulated consent decree. The United States' complaint against Cenco relies on numerous provisions of the SIP but does not even mention Rule 209. Finally, SCAQMD has never read its own Rule 209 to void a permit in a change of operator transaction. Thompson Decl. 8. For all these reasons, and the Court's basis, explained above, for adopting Defendants interpretation of Rule 209, the Court declines to defer to the apparent construction of the Rule in the NOV.

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[**24]

[*1139] 2. Alterations Made To Some Refinery Equipment, Standing Alone, Did Not Void The Refinery's Permit

a. Types of Alteration

CBE contends that the facility permit became void because under Rule 209 facility equipment was "altered" in four ways. First, Powerine "disconnected all fuel feed lines and disconnected and flanged a process feed line or removed a major component of the process for all of its RECLAIM sources." PSUF 60. Second, Powerine demolished a 28,000 square foot main office building, a warehouse, truck fuel loading racks, tanks and associated equipment, and sold the property on which the equipment was located. Id. at 17. Third, "the refinery fell into a state of disrepair due to non-use." Motion, p.11; PSUF 61-62. Fourth, prior to SCAQMD's issuance of a facility permit to Cenco, the City issued a Conditional Use Permit ("CUP") to Cenco containing 57 separate conditions of approval which required Cenco to make numerous modifications to the refinery. PSUF 64-65, 71-72, 77-79.

Defendants respond that the specific asserted changes to facility equipment either did not increase emissions, in which event NSR was not required under the SIP, or were in fact subjected to NSR. [**25] They rely on Rule 1303(b), which

provides that "the Executive Officer shall, except as Rule 1304 applies, deny the Permit to Construct for any new or modified source which results in a net emission increase of any nonattainment air contaminant at a facility, unless each of the following requirements are met ..." and then proceeds to list NSR requirements. According to defendants, the disconnecting and flanging of fuel lines did not result in emissions increases, but instead were "temporary measures taken in recognition of the fact that the equipment was temporarily non-operational." Opposition, p.15. The demolition of the office building was not subject to NSR because "demolition of equipment is not subject to NSR and the demolished office building never required a permit in the first place." The new truck loading rack replacing the demolished rack was subjected to NSR. Opposition, p.15; Vo Decl. 3, Exh.11. Regarding the alleged equipment disrepair, Defendants submit evidence to show that the equipment for which permits were reinstated was "largely in working order." Christopher Decl. 3-4. Finally, Defendants assert that the modifications required by the City's CUP were all subjected [**26] to NSR if they increased emissions. Vo Decl. 4, Exh.12.

[*1140] The Court must determine whether under the SIP the NSR requirement applies to alterations or modifications only if there is an increase in emissions. Rule 209 does not expressly confront the issue; it says nothing about NSR. But Rules 1303 and 2005 do indicate that NSR applies to modifications or alterations accompanied by emissions increases. *See* Rules 1303(a)(1); 2005(c)(1) ("the Executive Officer shall not approve an application for a Facility Permit Amendment to authorize the installation of a new source or modification of an existing source which results in an emission increase as defined in subdivision (d), unless the applicant demonstrates that: [BACT] will be applied to the source ..."). CBE appears to acknowledge that Rules 1303 and 2005, the SIP Rules that discuss NSR, do dictate that NSR apply to emissions increases. Motion, p.13; Reply, p.8 (arguing that NSR applies because "the proper baseline emissions for NSR purposes for the refinery was zero emissions"). Indeed, CBE does not explain what role Rules 1303 and 2005 would serve if Rule 209 requires that *any* modification or alteration calls for NSR, regardless [**27] of whether there was an increase in emissions.

In light of Rules 1303 and 2005, the Court finds Defendants' reading of the "alteration" clause in Rule 209 persuasive: "Rule 209 applies only (a) when an owner of permitted equipment alters the equipment such that the alteration results in a discrepancy between the equipment and the equipment description in the permit ..." DAMF 31. This interpretation is consistent with Rule 209's purpose to ensure that SCAQMD maintains accurate records of permitted equipment, who possesses the equipment and exactly how that equipment is characterized. In other words, as with transfers, it is those alterations that are unreported to SCAQMD that automatically void equipment permits. NSR, on the other hand, is required when alterations raise emissions.

b. Increase in Emissions: The Proper Baseline

CBE next argues that the alterations to refinery equipment *did* increase emissions and so under Rules 209, 1303 and 2005 they did require NSR because the shutdown facility's "baseline" emissions were zero. Reply, p.8. CBE relies on the definition of emissions increase in Rule 2005(d) n8: "an increase in emissions occurs if a source's maximum hourly potential [**28] to emit immediately prior to the proposed modification is less than the source's post-modification maximum hourly potential to emit." CBE asserts that "immediately prior" to the alterations and proposed alterations, the facility's potential to

emit was zero because 1) the permit to operate had expired on January 31, 1998, leaving no legal opportunity to emit and 2) actual emissions had been zero since 1995, when the facility suspended refining operations. Therefore, any resumption of operations following any alterations would increase emissions over the baseline of zero.

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n8 Rule 1303 does not include a definition of emissions increase.

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The Court rejects CBE's first argument. The mere fact that in 1998 Powerine voluntarily let its facility permit expire for failure to pay fees does not compel finding that NSR applies to the facility based on a zero emissions baseline. SIP Rule 301(d)(7) provides that a "permit which has expired due to non-payment of fees *may* be reinstated only by submitting a new application [**29] for permit accompanied by an application fee and the payment in full of the amount of fees due at the time the previous permit expired, if such reinstatement request is made within 24 months of the [*1141] date of expiration." (emphasis added). Under Rule 301, SCAQMD need not treat a source as a new source subject to NSR, as if going through permitting for the first time, just because a permit expired due to non-payment of fees, instead, the expired permit may simply be reinstated upon payment of the fee. The issue is money, not operability. Indeed, here, Powerine allowed its permit to expire with the express understanding from SCAQMD that SCAQMD *would* reinstate the permit later under Rule 301 if Powerine paid fees within a year. DAMF 16-17.

CBE's interpretation of 2005 would appear to nullify 301(d)(7) because it would require all equipment whose permit has expired, no matter how recently, to be treated as a new source subject to NSR, notwithstanding that Rule 301(d)(7) contemplates reinstatement of *old* and expired permits. The Court rejects this reading in light of Rule 301(d)(7). n9

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n9 CBE correctly points out that under Rule 1302(y), potential to emit is calculated "from permit conditions which directly limit the emissions." CBE takes the quoted language to mean that if a permit has expired, then emissions are limited to zero and potential to emit must be zero. Read reasonably and in context, the quoted language of Rule 1302(y) means simply that if a permit governing a certain piece of equipment expressly limits emissions in a certain way, potential to emit should not be calculated without taking that specific limit into account.

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CBE's alternative argument, that the refinery's emission baseline is zero in light of five years of non-emission, is weak. CBE accepts Rule 2005(d) as providing the definition of an emissions increase due to an alteration under the SIP. Reply, p.8. That Rule clearly provides that an emissions increase occurs if a source's "*potential to emit*" increases with an alteration or modification.

Rule 1302(y) defines "potential to emit" as "the amount of pollutants calculated (1) using a calendar monthly average and, (2) on a pound-per-day basis from permit conditions which directly limit the emissions, or when non such conditions are imposed, from: (1) the maximum rated capacity; and (2) the maximum daily hours of operation; and (3) the physical characteristics of the materials processed." CBE appears to argue that the refinery's potential to emit prior to the alleged alterations and modifications was zero because starting in 1995 its actual emissions were zero. But the mere fact that the facility was not actually emitting immediately prior to alterations does not mean it had no potential to emit at that time. Indeed, the federal regulations and cases discussing them that CBE relies on [**31] for indirect support n10 of its position undercut CBE's position. *WEPCO v. Reilly*, 893 F.2d 901, 916 (7th Cir. 1990) (source can have potential to emit in absence of any operations); *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 297 (1st Cir. 1989) (same). The Court finds that under the "potential to emit" standard in Rule 2005(d), CBE is incorrect that the facility's emissions baseline was zero prior to alterations or modifications.

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n10 CBE asserts that "EPA regulations *confirm* that the Refinery is a new source." Reply, p.9.

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c. Summary: Alterations

In sum, CBE has failed to demonstrate as a matter of law that alterations to some of the Refinery equipment voided the facility permit or require the application of NSR to the facility as a whole under Rule 209. CBE's contentions would require NSR every time a refiner subjected equipment to routine maintenance or to improvements. Such disincentives to capital improvements would hardly achieve the objectives of the CAA. [**32]

[*1142] 3. The Six-Year Shutdown of the Facility, in Conjunction with Refinery Modifications, Triggers New Source Review Under the Clean Air Act

CBE asserts that under both Rule 209 and the EPA's "Reactivation Policy," the Refinery was permanently shutdown and modified such that New Source Review applies. The thrust of CBE's argument is that because Powerine indicated an intent to permanently shutdown the Refinery, because the Refinery was then in fact shutdown for six years with no emissions, and because the Refinery will utilize different equipment and refine a different product ("reformulated gasoline") than the old facility, the Clean Air Act compels treating the Cenco Refinery as a new source, subject to the emissions requirements of the CAA's NSR program.

a. CBE Has Made a Strong Showing That Rule 209 Voids Permits for Equipment That Has Been Permanently Shutdown

Rule 209 states that "when equipment which has been granted a permit ... no longer will be operated by the permittee, the permit shall become void." CBE asserts that Defendants violated the plain language of the Rule "because Powerine informed SCAQMD that it would no longer operate the Facility." Motion, p.9.

Defendants [**33] respond that the quoted language of Rule 209 does not void permits upon the suspension of operations, but merely voids permits the equipment for which will be operated by a new owner when no change of ownership application has been filed. In other words, Defendants assert that the "no longer will be operated by the permittee" language merely explains what happens to permits (they are voided) when unauthorized transfers are attempted; it does not add an additional ground (suspension of operations) for voiding permits. In support, defendants assert that:

CBE's interpretation would have the effect of severely punishing a business that runs into financial trouble and must cease operating temporarily. Under CBE's view, such a facility would lose its permit to operate and could not reopen without incurring the expense and delay of NSR.

Opposition, p.12.

However, CBE counters that under its reading of Rule 209 not every suspension of operations necessarily voids a permit; instead, only a "shutdown" with the intent to *shutdown permanently* voids a permit under the "no longer will be operated by the permittee" language of Rule 209. This interpretation of the Rule is consistent [**34] with its language, is consistent with the EPA's Reactivation Policy, does not trigger the adverse consequences suggested by Defendants because it would not apply to clearly temporary operations suspensions, and addresses the practical concern that a long shutdown facility or one intended to be permanently closed presumptively should be subject to stringent emissions review upon its later resurrection.

Defendants assert that Rule 301 is inconsistent with CBE's interpretation of Rule 209 because Rule 301 allows reinstatement of permits that have expired due to non-payment of fees. This is incorrect. Subsection 301(d)(7), discussed *supra*, provides that reinstatement is allowed only "if such reinstatement request is made within 24 months of the date of operation." The Rule in fact supports CBE's position that Rule 209 voids permits for equipment that an owner has indicated he is permanently shutting down because it states that after a certain period of non-operation and non-payment of fees, equipment permits cannot be reactivated; reinstatements [*1143] are permissible *only* within a 24 month period.

At this point, the Court declines to rule that as a matter of law, either CBE's or Defendants' [**35] interpretation is correct. The statutory language and the record before the Court do not compel either result. However, the Court finds that CBE has at least made a showing of likelihood of success: CBE may very well demonstrate that Rule 209, quite sensibly, voids permits for equipment that has been shutdown or abandoned.

b. CBE Has Made a Strong Showing That the Factors in EPA's Reactivation Policy (Concerning the Application of NSR to Permanently Shutdown Facilities) May Be Taken into Account In Interpreting the Clean Air Act

Defendants do not dispute that the EPA has a 20-year-old policy of subjecting pollution sources that were permanently shutdown to New Source Review if those sources are restarted. *See In the matter of Monroe Electric Generating Plant Entergy Louisiana, Inc., Proposed Operating Permit*, Petition No. 6-99-2. "Order Partially Granting and Partially Denying Petition for Objection to Permit," dated June 11, 1999. Defendants also admit that SCAQMD in fact applied the

Reactivation Policy criteria to the Cenco facility. *See* Mueller Decl. 8. Nevertheless, defendants assert that the EPA Policy is unenforceable because it was not properly promulgated and [**36] is not a reasonable interpretation of the Clean Air Act subject to this Court's deference.

Defendants correctly assert that if the Policy imposes new substantive obligations above and beyond or different from those in the Clean Air Act, it is a "legislative rule" subject to notice and comment procedures under the Administrative Procedures Act. Opposition, p.27. It is undisputed that the Reactivation Policy was not subjected to notice and comment.

Defendants next assert that the Policy adds or changes obligations because 1) the CAA limits NSR to construction of new or modified facilities and EPA regulations "specifically exempt activities such as resumption of refining activities ... from the definition of 'modifications' subject to NSR," Opposition, p.27; and 2) "there is absolutely nothing in the Act or regulations which would suggest that interruptions in the operations of existing, permitted sources trigger NSR," Opposition, p.28.

However, CBE makes a strong showing that the Reactivation Policy is a reasonable interpretation of Clean Air Act regulations that does not conflict with any terms of the NSR Program. NSR regulations indicate that for a long-dormant facility (at least [**37] those shutdown for two years or more), the emissions baseline for determining whether it has undergone an emissions increase subject to NSR will be zero. n11 [*1144] Therefore, such a facility is subject to NSR upon restart, assuming the requisite increase in emissions over the zero baseline.

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n11 *See* 40 C.F.R. § § 51.165(a)(1)(vi)(A)(1), 51.165(b)(3)(1)(a) (NSR triggered by increase in "actual emissions"); 40 C.F.R. § § 51.165(a)(1)(xii)(B), 51.165(b)(21)(ii)("In general, actual emissions as of a particular date shall equal the average rate ... at which the unit actually emitted the pollutant during the two year period which precedes the particular date [the date of change] and which is representative of normal source operations"); 57 Fed. Reg. 32314, 32325 (July 21, 1992) (rejecting that EPA should consider a two year period within the last five years of a plant's operation as the representative period for plants that have been shutdown for more than five years); *In the matter of Monroe Electric Generating Plant Entergy Louisiana, Inc., Proposed Operating Permit*, Petition No. 6-99-2, p. 15, dated June 11, 1999 (stating that EPA "has applied its discretion narrowly in assigning representative periods other than the two years immediately preceding the physical or operational change"). In light of these regulations focusing the calculation of emission baseline on actual emissions in the two years proceeding a change, "EPA has made clear that in calculating the net emissions increase for reactivation of long-dormant sources potentially subject to PSD, the source is considered to have zero emissions as its baseline." *Monroe*, at 16.

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Although Defendants assert that the Policy applying NSR to permanent shutdowns conflicts with 40 C.F.R. § § 51.165(a)(1)(v)(C)(6), that regulatory

subsection states merely that "increase[s] in hours of operation or in the production rate," alone, do not constitute "modifications" subject to NSR. This provision is not inconsistent with finding that here, under the Reactivation Policy, 1) there is not a mere variation in the hours of operation but a fundamental change in the facility's operational status, from six years of non-operation to full operations and 2) the restart will be accompanied by independent physical modifications to the Refinery triggering a comparison of new emissions to the zero baseline.

The Court finds on these bases that CBE has made a persuasive showing that the Reactivation Policy is a permissible and reasonable standard to apply in interpreting the Clean Air Act. Although the parties dispute whether EPA's interpretation is entitled to "deference" or "respect," no one contends that the Court must ignore a federal regulatory agency's reasonable analysis of its own regulations. n12

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n12 In light of the Court's ruling that CBE has made a strong showing that the criteria set out in the Reactivation Policy may be taken into account and are a reasonable interpretation of the CAA, and SCAQMD's admission that it in fact applied the Reactivation Policy Criteria to the Cenco refinery, the Court rejects Defendants' argument that they did not have "fair notice" of the Policy.

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c. CBE Has Made a Strong Showing That the Refinery Was Permanently Shutdown Under Rule 209

The Court also finds that CBE has demonstrated that it is likely to succeed on the issue of whether the Refinery would "no longer be operated" or was "permanently shutdown."

The SIP does not expressly describe what factors are important to an analysis of whether a facility would no longer be operated by the permittee. However, the EPA's Reactivation Policy, which requires the application of NSR to facilities that have been "permanently shutdown" and thus addresses the same concern embodied in the "no longer will be operated" clause of Rule 209, does lay out a series of factors to be considered. The Court finds these factors apt and analyzes the Cenco refinery in their light, as well as the parties' contentions.

Under the Reactivation Policy,

EPA has examined factors such as the amount of time the facility has been out of operation, the reason for the shutdown, statements by the owner or operator regarding intent, cost and time required to reactivate the facility, status of permits, and ongoing maintenance and inspections that have been conducted during shutdown ...

[**40] *In the matter of Monroe Electric Generating Plant Energy Louisiana, Inc., Proposed Operating Permit*, Petition No. 6-99-2, p. 9-11, dated June 11, 1999.

i. Two Years or More of Non-operation

CBE asserts that the Refinery must be presumed permanently shutdown because [*1145] it was not operational for not just two but six years. Defendants respond merely that "various operations have been conducted at the facility virtually throughout the time period in question." Opposition, p.20. However it is undisputed that the facility has not refined crude oil since 1995. Moreover, Cenco appears to have made admissions that any activity at the facility was that of a "skeleton staff that oversees the maintenance of its assets, which consist of an oil refinery and related assets." Reply Request for Judicial Notice, Exh.4. Such maintenance-oriented activities are not sufficient to contradict that the Refinery did not operate for five years.

ii. Reason for Shutdown

CBE contends that the Refinery shutdown for economic reasons and that such shutdowns are "generally considered 'permanent' under the reactivation policy." Motion, p.18. However, although in some instances that EPA has found facilities [**41] that had shutdown for economic reasons permanently shutdown, the economic reasons appeared to be incidental to the decisions. It appears that under the Reactivation Policy, an economic reason for shutdown, standing alone, does not militate in favor of finding one way or the other.

iii. Intent and Plans to Restart

CBE quotes *Monroe Electric*, at 10-11, for the proposition that where a facility has been shutdown for over two years, owners and operators "must continuously demonstrate concrete plans to restart the facility sometime in the reasonably foreseeable future. If they cannot make such a demonstration, it suggests that for at least some period of the shutdown, the shutdown was intended to be permanent." As CBE points out -

. In June 1995, Powerine wrote SCAQMD that it would be shutting down its refinery beginning the first week in July, 1995. PSUF at 8. Powerine suspended all refining operations on July 3, 1995 and has not refined crude oil since that date. Id. at 9.

. In October 1995, Powerine informed SCAQMD that it was "in the process of shutting down the refinery for its ultimate dismantling" and that Powerine's new parent company planned to dismantle the refinery. [**42] Id. at 12-13. Also in October 1995, Powerine applied to SCAQMD to obtain Emission Reduction Credits. Id. at 14. Moreover, Powerine repeatedly requested suspension of regulatory reporting requirements due to the refinery having suspended operations. Id. at 41.

Defendants respond that Powerine repeatedly expressed its intent to resume crude oil refining both to SCAQMD and to other entities. For example,

. In December 1995, Powerine informed various state entities, including the Los Angeles Regional Water Quality Control Board, that the refinery might be resuming crude oil processing. DAMF 60. It informed the Regional Water Quality Control Board that Powerine was negotiating with a prospective buyer who "planned to bring the refinery back in operation, and rehire the majority of 350 laid off employees" and "desired to purchase the refinery equipment back from Kenyen Projects Ltd, the firm which purchased the refinery equipment and had been making plans to dismantle the refinery equipment and transport it to India." Christman Decl., Exh.16.

. Powerine wrote numerous letters to SCAQMD from January 1996 to January 1998 explaining that it sought to keep open the possibility of restarting [**43] the facility. *See* January 10, 1996 letter, Christman Decl., Exh.17 (seeking extension from Fee [*1146] Review Committee "to enable Powerine to pursue an option that may result in a restart of refining operations").

Although Powerine repeatedly attempted to secure the option of resuming refining, it does appear that there was at least one period during which the shutdown was intended to be permanent - the period between September 1995 when Powerine contracted with Kenyen and December 1995 when Powerine informed a state agency that it was negotiating with a buyer who sought to potentially resume refining operations. This would appear to negate any showing by Defendants that Powerine *continuously* planned to restart the facility. Defendants' evidence that Powerine management was not happy with the deal its parent Castle had cut with Kenyen is insufficient to show that Powerine had an intent to reopen the facility and concrete plans to do so at the time. n13 Moreover, it is not clear that Powerine had "definite plans to restart" the facility or an "expectation to use" the facility "in the foreseeable future" throughout the shutdown period. *See Monroe Electric* at 19, 20. Defendants [**44] proffer a declaration from a Cenco V.P. and former Powerine C.F.O. that "Powerine made extensive efforts to obtain financing in order to resume crude oil refining during the 1995 to 1998 time period" and "held discussions with numerous entities regarding financing for crude oil refining operations." However, this hardly establishes definite plans to restart the facility in the foreseeable future.

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n13 Equally insufficient, standing alone, is defendants' evidence and argument that the Kenyen deal was contingent on financing and that Powerine management doubted that Kenyen would be able to go through with the deal.

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Under the literal language of *Monroe*, Defendants carry the burden of showing continuous intent to reopen and definite plans to restart in the foreseeable future. The Court finds that although Defendants have raised a triable issue as to their intent, CBE is likely to succeed on the merits.

iv. Cost and Time Required to Reactivate

Although the parties dispute the exact numbers, it is clear that [**45] reactivation costs will equal between $ 28 million and $ 180 million. That huge disparity results primarily from the fact that Cenco is not only resuming refining operations but is making many "non-essential" upgrades to the facility as well. Defendants assert that mere "turnaround costs" are $ 28 million, while the total cost including all upgrades is much higher.

There is also a large disparity between the estimates for time to reactivate the facility. CBE estimates 18 months while Defendants estimate six months.

Even accepting Defendants estimates, the numbers are higher than in other cases where the EPA found facilities permanently shutdown. Motion, p.18-19. Nevertheless, Defendants proffer evidence that turnarounds, like the one here, are routine every three to five years in the industry. Christman Decl. 19.

Overall, the cost and time for reactivation factor slightly favors finding a permanent shutdown.

v. Status of Permits

Although CBE points out that Powerine allowed its facility permit to expire in 1998, Powerine did so with the express understanding that the permit could be reinstated within a year if fees were paid. Powerine reinstated the permits within six [*1147] months. [**46] Christman Decl. 18. Moreover, Powerine kept its other permits up to date throughout the period of suspension of operations. n14 Id. at 11, 14, 15. This factor favors finding no permanent shutdown.

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n14 As Defendants pointed out at the hearing, SCAQMD maintained the Refinery on its emissions inventory. This too militates in favor of finding no permanent shutdown.

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vi. Ongoing Maintenance and Inspections

It is undisputed that around two dozen employees have worked at the refinery since 1995 to maintain equipment. DAMF 68. This factor supports finding no permanent shutdown.

vii. Summary

CBE's strongest point is that Defendants have not shown that Powerine had a continuous intent and concrete plans to restart the facility. Although it is a matter of some factual dispute, it does appear that for at least some short period of time, Powerine intended to shutdown and dismantle the facility, not restart it. *Monroe Electric* indicates that this is fatal. On this basis, CBE may have demonstrated at least a likelihood [**47] of success on the merits of the Reactivation Policy, but not enough to warrant summary judgment, given the disputes about not only the facts but the permissible or necessary inferences from facts. n15

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n15 The Court acknowledges that at least on the surface there could be a tension between the analysis in section A.2.ii concerning the proper baseline for emissions under Rule 2005(c) and the conclusion in this section. The tension is only apparent, however, not real. Rule 2005(c) and (d), calling for a comparison of a facility's pre-modification and post-modification "potential to emit," apply to "Requirements for *Existing* Reclaim Facilities," and modifications to those existing facilities. In section A.2.ii, the Court addressed CBE's contention that mere alterations, putting aside the facility's shutdown, necessitated NSR. However, in section A.3 of this Order, the Court finds that CBE has shown a likelihood of demonstrating that the Facility needs to be treated as new because it was intended to be permanently shutdown under Rule 209. Therefore, the restarted facility's emissions should be compared to a baseline reflecting the pre-restarted facility's non-existent actual emissions during its six years of shutdown. (Footnote 11 of this Order discusses

regulations calling for the comparison of a facility's *actual* emissions). Defendants do not dispute that under the Clean Air Act, NSR applies to the Refinery if it is deemed a new facility with an emissions baseline of zero.

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4. Miscellaneous SIP Provisions

CBE asserts that Defendants violated several other SIP provisions: Rule 2005(c)(2) requiring that a facility hold sufficient RECLAIM trading credits to offset facility emissions for the first year of operation (FAC Fifth Cause of Action); Rule 201 prohibiting construction without first complying with NSR (FAC Seventh Cause of Action); Rule 210 prohibiting submission of incomplete or inaccurate information - here, failure to submit materials required by NSR - to SCAQMD (FAC Seventh Cause of Action); and Rule 212 requiring a 30 day Public Comment period for grants of permits (FAC Second Cause of Action).

Defendants' only persuasive defense to these claims is that if CBE loses on its NSR claims, then it loses on these claims as well. But because this Court has found that CBE has shown a likelihood of successfully showing that NSR applies to the facility, the Court finds that it has also shown a likelihood of successfully showing that Defendants violated these SIP provisions.

[*1148] B. Relief

The Court finds that although CBE has not demonstrated an entitlement to summary adjudication of any of its claims, it has shown a likelihood of success on [**49] the merits, for the reasons above.

CBE has also made a showing of irreparable harm. It is undisputed that "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least long of duration, i.e., irreparable." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545, 94 L. Ed. 2d 542, 107 S. Ct. 1396 (1987). Here, Defendants admit that compliance with NSR and installation of BACT on every emissions source would lower the Refinery's emissions of air pollutants. PSUF 127-128.

Moreover, when environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment. *See Save the Yaak Committee v. Block*, 840 F.2d 714, 722 (9th Cir. 1988). Although Defendants assert, without evidence, that there is a gasoline shortage and that the Cenco Refinery will help reduce it, the Court finds the public interest favors enforcing the Clean Air Act and protecting the environment.

Although CBE has not made a showing that environmental harm is immediate, CBE has demonstrated that NSR should have been applied to the facility and that permits [**50] have already issued allowing construction on and operation of the Refinery. Under these circumstances, the Court finds that an injunction preliminarily precluding Defendants from performing the permitted construction on or operation of the Refinery without applying NSR is warranted.

The Court has not received any proposed order from CBE detailing all aspects of the proposed preliminary injunction. CBE is therefore Ordered to do so by not later than seven calendar days from the date of this order. The terms of the

injunction should be consistent with CBE's request for relief at pages 2-3 of its opening motion.

Although CBE cites some authority approving of waiving the bond requirement in environmental citizen suits, *People ex rel Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir.1985), the Court is not persuaded that a bond would be inappropriate in this case. Therefore, Defendants are ordered to present the Court with documentation as to what would constitute an appropriate bond, taking into account the apparent non-commercial, non-profit status of CBE, by not later than five calendar days from their receipt of CBE's proposed order.

[**51] IV. CONCLUSION

For the reasons set forth above and good cause appearing therefor, the Court DENIES CBE's motion for summary adjudication and a permanent injunction and GRANTS CBE's motion for a preliminary injunction.

IT IS SO ORDERED.

DATE: September 26, 2001

A. Howard Matx

United States District Judge

RESPONDENT'S EXHIBIT 20

JUL 8 1996

Mr. Peter F. Hess
President, Joint Commission
of Regulators & Business
3232 Western Drive
Cameron Park, California 95682

Dear Mr. Hess:

This is in response to your letter of May 14, 1996,, in which you present the California Air Pollution Control Officers Association Joint Committee of Regulators and Business (CAPCOA) concerns about a policy memorandum I sent to David Howekamp on August 26, 1994. In the August 1994 memorandum, the Environmental Protection Agency (EPA) requires that banked emission reduction credits (ERC's) be adjusted to reflect current State implementation plan requirements at the time of use.

In your letter, CAPCOA states that reasonably available control technology (RACT) adjusting of ERC's at time of use provides too much uncertainty for sources to voluntarily do early reductions through innovative technology, because EPA may eventually define RACT to be equal to the innovative technology. In the past, EPA has issued guidelines on what could be considered RACT, but, in recent years EPA has been, for the most part, leaving the determination of RACT to States' discretion. Therefore, EPA believes that if RACT is set in a way to discourage early reductions, the State is likely to be responding to particular air pollution problems present in its community.

The CAPCOA letter suggests that discounting for RACT at time of use is unfair to sources that voluntarily shut down or have otherwise reduced emissions because they did not know when the reduction occurred that it would be adjusted for RACT. Since existing sources need to reduce their emissions when new emission reduction requirements are adopted by a State, it seems equitable that emissions in a bank also be subject to emission reduction strategies. Air quality management is an iterative process. A State reduces some emissions and determines the effect on air quality. If the area continues to experience air quality problems, then the State must refine its attainment strategy to further reduce emissions. Therefore,. the use of ERC's that would either increase emissions above the current levels or lead to a shortfall in expected reductions could greatly reduce the effectiveness of a given attainment demonstration.

Finally, your letter states that it is unfair for owners of banked ERC's not to be able to sell or use them. However, please note that although ERCs are a limited authorization to emit, they are not and never have been an absolute property right. States have always had the ability to discount banked ERC's as needed for attainment purposes. Recent examples of this have occurred in the Los Angeles area. States must continue to retain this ability if they are to effectively manage the air resources in their community.

My August 26, 1994 policy memorandum recognized many of the concerns you and Region IX raised regarding this issue by offering several options in lieu of direct discounting of a particular project's ERC's at time of use. I encourage you to work creatively with EPA and State and local officials to explore any option which would address the concerns raised in your letter and the basic test which is outlined here and was explained more fully in the August 26, 1994 memorandum.

I appreciate this opportunity to be of service and trust that this information is helpful.

Sincerely,

(Original signed by Seitz)

John S. Seitz
Director
Office of Air Quality Planning
and Standards

OAQPS:AQSSD:ISEG:REVANS:541-5488:sjoumnigan:MD-15:6/13/96
Control No. AQPS-96-0280 Due Date: 6/6/96
Revised 6/27/96-WEIGOLD:spc:a:HESS.LTR

RESPONDENT'S EXHIBIT 21

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE. SUITE 1200
DALLAS. TX 75202-2733

November 19, 1992

Mr. William R. Campbell
Executive Director
Texas Air Control Board
12124 Park 35 Circle
Austin, Texas 78753

Re: Interim guidance on New Source Review (NSR) Questions Raised in Letters Dated September 9 and 24, 1992.

Dear Mr. Campbell:

This is in response to letters to my staff dated September 9 and 24, 1992, from Ms. Karen Olson and Mr. Kerry Drake respectively, of the Permits Division. These letters raised significant questions and issues related to the new source permitting in nonattainment areas as required by the Clean Air Act Amendments (CAAA) of 1990. As discussed during a conference call September 30, 1992, and an October 8, 1992, meeting in Dallas, we are providing this initial response which addresses most of the items of concern. We will, however, be furnishing you with any additional guidance to remaining items which are identified in a subsequent letter.

The Environmental Protection Agency (EPA) has provided many of the Agencys' interpretations of the new Part D NSR requirements in the General Preamble to Title I (57 FR 13498) dated April 16, 1992. We wish to commend the State of Texas for its action in adopting revisions to its NSR rules consistent with Title I of the 1990 CAAA. However, it is not surprising that in a program of this magnitude some ambiguities remain. At this time, we are not expecting any additional national guidance in the near future. However, we agree with you that we jointly need some basis to proceed between the November 15, 1992, effective date of your nonattainment NSR permitting regulations and any additional direction we may receive at the national level. Therefore, we hope to use this and subsequent letters to articulate the interim guidance we will follow in the absence of national guidance. After national guidance is issued, it may be necessary to revise this interim guidance to conform to such national guidance. Any application which has been submitted and determined to be complete after the issuance of final national guidance, may be subject to the interpretations of such final guidance.

Outlined below is our interim guidance in response to the questions raised by the Texas Air Control Board (TACB) in its letters dated September 9 and 24, 1992.

1. Does any increase in emissions at a major source trigger the de minimis threshold test? Is there a lower cutoff?

   There is a concern that the current de minimis rule would be onerous and not practical for certain small changes such as adding a valve, pump, or small boiler. The TACB has suggested that an individual change of less than 5 tons per year (tpy) increase not be required to undergo nonattainment review nor should it trigger the requirement to perform de minimis netting. If the proposed increase equals or exceeds 5 tpy, only those increases and decreases; of 1 tpy or greater will be included in the de minimis test.

   We appreciate the concern that a literal interpretation of the definition of de minimis, as contained in Section 182(c)(6) of the Clean Air Act (CAA), could be potentially onerous to the States, the individual permit applicants, and EPA. However, our concern with setting a de minimis threshold is that projects that would aggregate to 25 tpy or greater should in no way become excluded from the NSR permitting requirements. In order to ensure this, we would support in this interim guidance the following two step approach. 1) we would agree with an interim policy of setting a de minimis threshold at 5 tpy for purposes of starting the accounting process for the netting calculation. If a project's emissions would be less than 5 tpy, then the company would not be subject to the 5 year de minimis threshold test, provided that de minimis netting is not required in Step 2 below. However, the source would be required to keep track of the emissions changes. The 5 year de minimis threshold test would only be applied when the project's emissions equal or exceed 5 tpy. Once this 5 tpy de minimis level would be exceeded, then all emissions increases and decreases associated with a physical change or change in the method of operation would be included in the test. The source would then be subject to the nonattainment permit requirements if the net emission increase is greater than 25 tpy. 2) The second test is as follows. If the aggregate of emission increases and decreases after November 15, 1992, become greater than 25 tpy (excluding projects for which an application was received before November 15, 1992, and was subsequently determined to be complete), then the source would be subject to performing the 5 year de minimis threshold test. If the accumulation of all emission increases and decreases over the contemporaneous timeframe was determined greater than 25 tpy, then the nonattainment NSR requirements would be applicable.

Your staff has noted concern with tracking the accumulation of emissions for Step 2. One way to implement the policy outlined could be to have the source submit a certification with the application for a permit or exemption. This certificate would state that the increase from the project does not exceed 5 tpy and the accumulation of increases and decreases since November 15, 1992, does not exceed 25 tpy. The State could then use the annual emission statements that companies will have to submit starting in 1993 as a check that no source has had net increases more than 25 tpy without going through nonattainment New Source Review.

Neither of these approaches allow for excluding increases of 1 tpy or less from emissions tracking. However, it does allow for exclusion of routine repair, replacement or maintenance which may be excluded from review under the definition of major modification.

Enclosed are example calculations of how the above described netting would work.

2. What is the exact definition of the 5 year period for the de minimis threshold test?

In the September 9, 1992, letter, TACB proposed to use the same definition as found in the Prevention of Significant Deterioration (PSD)/NSR regulations prior to November 15, 1992, which specify that the contemporaneous period begins 5 years prior to commencement of construction and ends when the proposed project begins operation: However, in section 101.1 of TACB's revised regulations, TACB defined the 5 year period to be 5 consecutive calendar years which includes the year of the project and the 4 previous years, which is consistent with the statutory definition of de minimis emissions. As was discussed on October 8, 1992, TACB would need to revise its regulation to be consistent with its proposal to have the 5 year period under the nonattainment NSR regulations identical to the 5 year period for PSD netting. We agree that Texas could use either definition of the 5 year period. This is premised on our belief that the contemporaneous timeframe for netting under the PSD program (40 CFR 52-21 (b)(3)(ii)) is as stringent or more stringent than the definition in Section 182(c)(6) of the CAA. Both the definition in Section 182 (c) (6) and the PSD definition in 52.21(b)(3)(ii) specify a 5 year timeframe including the period when the increase or particular change occurs.

3. Do majar sources, such as asphalt concrete plants, that move often within nonattainment areas, as well as in and out of nonattainment areas, require a nonattainment permit each time they move?

Portable sources currently in an ozone nonattainment area may relocate within the same nonattainment area without obtaining a nonattainment permit, provided that no physical change or change in the method of operation occurs which results in an emissions increase. A source relocating from outside the nonattainment area must obtain a permit if it has not been previously permitted within the area and is not included in the emissions inventory for the nonattainment area. A nonattainment permit is also required if a source relocates from one nonattainment area to another nonattainment area.

This guidance is not meant to exempt the relocation of sources that are not generally considered portable from nonattainment NSR. For example, moving a painting operation from one part of a nonattainment area to another would result in review.

4. TACB states that the definition of major source it serious and severe ozone nonattainment areas in Sections 182 (c) and (d) could be interpreted to include fugitives emissions. They would like to extend this definition to marginal and moderate ozone nonattainment areas for the purposes of Consistency.

   On October 8, 1992, TACB indicated that it would retain their existing definition of a major facility/stationary source. Its revised NSR regulations presently do not require fugitive emissions to be considered in determining applicability unless the source belongs to certain categories specified in the regulation. This is an acceptable approach.

5. For sources which trigger review for nitrogen oxides (NO_x) under both nonattainment review and PSD, TACB proposes to conduct a combined review which will include nonattainment review enhanced by NO_x increment modeling.

   This is the type of review that we anticipated would be performed and appears to be a reasonable and correct approach. As agreed upon October 8, 1992, all applicable requirements of the PSD review and nonattainment review must be met.

6. What are applicants and permit engineers expected to do when implementing lowest achievable emission rate (LAER)?

   TACB mentioned the need for certain specified improvements in the RACT/BACT/LAER Clearinghouse, including the need for specifying emission levels in consistent units (i.e. lb/mmbtu, ppm, gr/dscf, etc.).

On October 8, 1992, it was agreed that the LAER determination would include a review of the RACT/BACT/LAER Clearinghouse. The review of the clearinghouse information would serve as a floor for the LAER determination. However, at this time the Clearinghouse is not considered comprehensive enough to be an adequate reference by itself for the ultimate determination of LAER. Ultimately LAER should be decided based on the technical evaluation and experience of the State permit engineer in conjunction with consideration of comments from EPA and the public. This approach should ensure that LAER is determined consistent with the regulatory definition.

7. How and to what depth must the alternative site analysis be performed?

TACB had suggested that an applicant include an alternative site analysis in its permit application, which TACB would maintain in the permit file.

In the absence of national guidance, we support development by TACB of reasonable interim procedures that can be implemented. Such interim procedures should include an appropriate level of technical review (as determined by the State) and ensure that comments from the public and EPA are adequately addressed for the public record.

At the meeting in Dallas on October 8, 1992, Ms. Karen Olson provided us material on the Texas Enterprise Zone Program from the Texas Department of Commerce. We are continuing to explore potential uses of the established Enterprise Zones Program for satisfying the alternative site analysis requirements. We will respond separately to you on this question.

8. When a modification exceeds de minimis level, is only the current project to be offset, or is tie entire contemporaneous increase to be offset? If the offset provided by the applicant is in excess of the required amount, can the balance be used for future offsets?

In the absence of written national guidance on this subject, we are interpreting that only emissions associated with the specific project that results in the de minimis level being triggered are required to be offset. It is important to note that any emission increases occurring since the 1990 emission baseline must appear in future reasonable further progress tracking, be accounted for in the 15 percent requirement and be accounted for in the

attainment demonstration. It is in the State's discretion to require a more restrictive interpretation (such as offsetting the entire net emissions increase) during the interim in order to further progress toward attainment.

In regard to remaining excess offset credits, they would remain creditable if they continued to neat all criteria for creditable emissions reductions. This excess could also be deposited (or retained if previously deposited) in an approved bank.

9. Several questions were raised concerning the internal offsetting provisions for serious ozone nonattainment areas in Section 182 (c)(7) and (8) of the Act. These questions include: (A) What is an internal offset? (a) If an internal offset is provided would not the modification have been de minimis in the first place? (C) Would an internal offset be considered in future de minimis threshold tests? (D) Do these rules apply for serious areas only? (2) Since TACB proposes to do netting consistent with PSD does that eliminate this option?

National guidance does not presently exist to address the issue of internal offsets. Since TACB proposes to use the "Plant wide" source definition (as opposed to a "dual source" definition), internal offsets would be accounted for in the source wide netting under the de minimis rule in Section 182(c)(6) of the CAA.

Because the use of internal offsets are optional under Sections 182 (c) (7) and (8) of the CAA, and EPA has not issued national guidance concerning the use of internal offsets, TACB has agreed not to implement the provisions of Sections 182 (c) (7) and (8) which relate to internal offsets during the interim period covered by this guidance. We agree with this approach since the State's regulation does not define the term internal offsets or the extent of its use.

In connection with this matter, we note that footnote 2 of Table I (definition of "major modification") of TACB is revised definitions provides that best available control technology (BACT) may be used as an alternative to LAER in severe ozone nonattainment areas if an offset ratio of 1.3 to 1 is used. This would be contrary to the above discussion, and to the 1990 CAAA. Footnote 2 was apparently included to incorporate the 1.3 to 1 internal offset provision in Section 182(c)(8), which provides relief from the requirement to utilize LAER at a source whose potential emissions are greater than 100 tpy, if an internal

offset ratio of 1.3 to 1 is used. It was agreed on October 8, 1992, that TACB would delete Footnote 2, consistent with the previous paragraph in which TACB agreed not to implement the internal offset provisions.

10. What is the status of pre-1990 baseline increases and reductions in the context of the de minimis threshold test and for offsetting? TACB expands this question further in its letter dated September 24, 1992.

Pre-1990 emissions increases and decreases are creditable for the purpose of determining applicability (i.e. netting). Under this interim policy, the period for which netting would be performed would be consistent with the PSD definition. (See response to question 2). Pre-1990 decreases (with the exception of shutdowns or curtailment of production or operating hours) may be used for the purposes of satisfying general offset requirements only if they are federally enforceable prior to 1990, are still federally enforceable, and are carried over as growth in an approved post-1990 attainment demonstration. Use of prior shutdowns before an approved attainment demonstration is in place, will be addressed by EPA in a separate response.

Clearly, if the State wishes, it can be more stringent by not allowing pre-1990 emission decreases to be used for offsets. This approach may be especially useful in instances where pre-1990 credits cannot be well accounted for in the Rate of Progress State Implementation Plan (SIP)

11. Is there a time frame for offset expiration?

In general, offsets can continue to exist as long as they are accounted for in each subsequent emissions inventory. They expire if they are used, or relied upon, in issuing a permit for a major stationary source or major modification in a nonattainment area, or are used in a demonstration of reasonable further progress.

The State may include an expiration date in its SIP to ensure effective management of the offsets. For example, TACB's proposed banking rule would require each individually banked offset to expire 5 years after date the reduction occurs, if it is not used. The rule also provides that a particular banked reduction will depreciate by 3% each year that it remains in the bank. EPA is supportive of the approach Texas has taken in its proposed banking rule to limit the lifetime of the offsets and to allow for an annual depreciation.

12. NO_x is a precursor for both ozone and particulate matter less than 10 microns (PM-10). What defines a major source for a precursor in this case? Will NO_x be offset for ozone and PM-10?

    With reference to ozone, NO_x will be treated just like volatile organic compounds (VOC) except in transport regions where the major source threshold will be 100 tpy. (There are, of course, no transport regions in Region 6.) NO_x Will be regulated as a precursor for PM-10 only in certain sections of the country where EPA determines, in conjunction with the State, that precursors contribute significantly to the nonattainment area problem. (Texas is not considered to be one of those areas at present).

13. What are the precursors to PM-10?

    As stated in the April 2, 1991, memorandum from John Calcagni (Director, Air Quality Management Division) to the Regional Air Division Directors, entitled PM-10 Moderate Area SIP Guidance: Final Staff Work Product PM-10 precursors are defined to include volatile organic compounds which form secondary organic compounds, sulfur dioxide which forms sulfate compounds, and nitrogen oxides which form nitrate compounds (pg. 7). In general, EPA believes that PM-10 precursor emissions will not significantly contribute to PM-10 ambient levels except in a few major metropolitan areas (e.g., Loos Angeles, Salt Lake County, Utah County, Denver, San Joaquin Valley) (pg. 10). No areas in Texas were specifically mentioned in the Staff Work Product. See also the discussion in Item 12 above.

Additional question from TACB's letter dated September 24, 1992:

14. once a project has been offset, will the amount that is offset be relied upon in future determinations of the contemporaneous net increase? Restated, will the slate be partially or totally "wiped clean" (depending on whether or not the current project is offset, or the entire contemporaneous increase is offset)?

    First, recall that netting credits cannot be acquired outside the source for which the permit application is submitted. If a reduction has been used only as a netting credit and the source has netted out of review, then the credit is available as long as it remains in the contemporaneous time period.

    If an emission reduction at a source is used as an external offset for another source, that reduction can no longer be relied upon for netting purposes at the first source. Restated, the increase from the proposed project and the project offset

would be wiped off the slate for future netting and offset transactions. In addition, if the State chooses to offset any additional contemporaneous increases and decreases, such changes are also wiped off the slate for future netting transactions. The remaining emission increases and decreases within the 5 year contemporaneous timeframe would continue to be included in future netting transactions.

If a reduction meets all the criteria for a creditable offset and only part is used in an offset transaction, the unused part can be applied to future offsets, if proper accounting and federal enforceability are ensured. An example would be as follows:

Source "A", a major stationary source in a nonattainment area, applies for a permit to modify. Source "B" shuts down operations that produce 250 tpy of VOC reductions. The emissions increase from the proposed project (excluding contemporaneous increases and decreases), after application of LAER, is 150 tpy, and the overall net emissions increase exceeds de minimis. The 250 tpy reduction from source "B" is made federally enforceable and used to offset the 150 tpy increase from source "A". If the sources are located in a severe ozone nonattainment area, the required offset ratio is 1.3 to I or 1.3 X 150 tpy = 195 tpy. The difference of 55 tpy remains creditable as an offset as long as it meets the criteria identified in item # 11, above. Of course, the State may choose to offset any contemporaneous increases and decreases in addition to the project increase consistent with the approved SIP.

We appreciate this opportunity to review these issues with you. We will respond to the remaining item you have identified as quickly as possible.

If you have any questions, please contact me at (214) 655-7200, Mr. Gerald Fontenot, Ms. Jole C. Luehrs, Mr. Stanley M. Spruiell, or Mr. Thomas H. Diggs, Air Programs Branch Staff, at (214) 655-7205, or Ms. Lucinda S. Watson, Office of Regional Counsel at (214) 655-8071.

Sincerely yours,

Stanley Meiburg
Director
Air, Pesticides and Toxics, Division (6T)

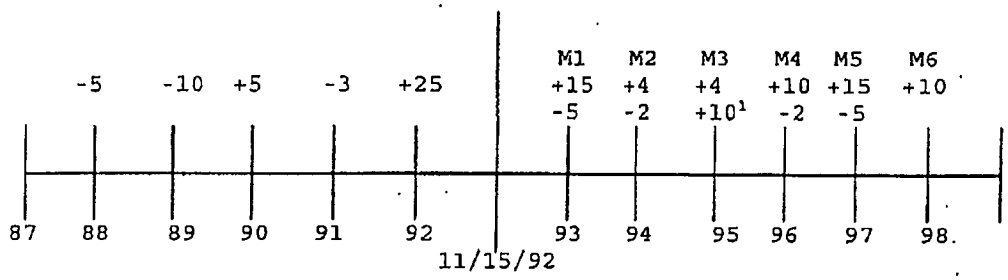
Enclosure

Enclosure

The TACB submitted letters dated September 9 and 24, 1992 posing questions regarding nonattainment NSR. Shown below are examples of modification scenarios that demonstrate our response to Item I of this letter.

Netting and offset calculations for nonattainment review (emissions represent VOC in a severe ozone (O_3) nonattainment area)

EXAMPLE 1.



MODIFICATION M1:

Step 1: Project increase is +15 tons per year (tpy) > 5 tpy. Netting is required.

Net emissions increase (NEI) = NEI = +15 + (-5+25-3+5-10-5)
= +15 + (+7) = +22 tpy

NEI < 25 tpy. Nonattainment review is not applicable.

MODIFICATION M2:

Step 1: Project increase is +4 tpy < 5 tpy.
Step 2: Net Changes after 11/15/92 = +4-2+15-5=12 tpy<25 tpy.

Netting is not required.

MODIFICATION M3:

Step 1: Project increase is +4 tpy < 5 tpy.
Step 2: Net Changes after 11/15/92=+4+4-2+15-5=+16 tpy<25 tpy.

Netting is not required.

[1]Increase is authorized by permit whose complete application was filed before 11/15/92.

MODIFICATION M4:

Step 1: Project increase is +10 tpy > 5 tpy. Netting is required.

NEI = +10 + (-2+4+10+4-2+15-5+25-3) = +10 + (+46) = +56 tpy
NEI > 25 tpy. Nonattainment review is required.

Total Emissions to be Offset = +10 + (-2+4+4-2+15-5,) = +10 + 14 = +24 tpy[2]

The required offset ratio in a severe O_3 nonattainment area is 1.3:1 or 1.3 x 24 = 31.2 tpy.

All increases which occur after 11/15/92 (except for the 10 tpy increase which was authorized in an application before that date) are relied upon in issuing Modification M4. They may not be used in future netting or for future offsets.

MODIFICATION M5:

Step 1: Project increase is +15 tpy > 5 tpy. Netting is required.

NEI = +15 + (-5+10+25) = +15 + (+30) = +45 tpy
NEI > 25 tpy. Nonattainment review is required.

Total Emissions to be Offset = +15 + (-5) = +15 - 5 = +10 tpy.
The required offset ratio in a severe O_3 nonattainment area is 1.3:1 or 1.3 x 10 = 13 tpy.

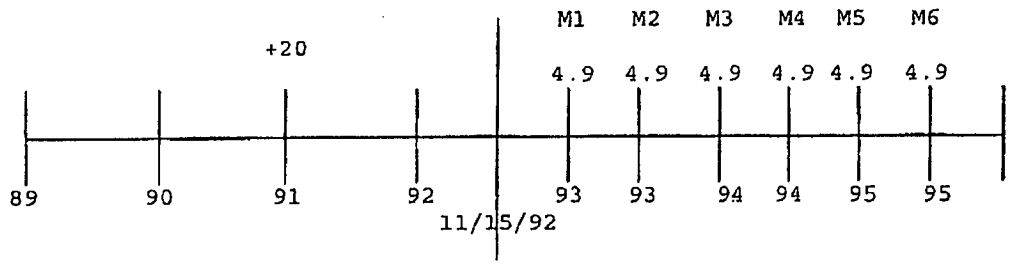
MODIFICATION 6:

Step 1: Project increase is +10 tpy > 5 tpy. Netting is required.

NEI = +10 + (+10) = +10 + (+10) - +20 tpy
NEI < 25 tpy. nonattainment review is not applicable.

[2]This method is consistent with the procedure described in item 6 of the letter.

EXAMPLE 2.



MODIFICATIONS M1 THROUGH M5:

Step 1: Project increase is 4.9 tpy < 5 tpy. 2: Net Changes after 11/15/92 < 25 tpy. Netting is not required.

MODIFICATION M6:

Step 1: Project increase is 4.9 tpy 5 tpy.
Step 2: Net Changes after 11/15/92=6 x 4.9=29.4 tpy>25 tpy.

NEI = 29.4 + 20 - 49.4 tpy.
NEI > 25 tpy. Nonattainment review is required.

Total Emissions to be offset = 29.4 tpy.
The required offset ratio in a severe O_3 nonattainment area is 1.3:1 or 1.3 x 29.4 = 38.2 tpy.

RESPONDENT'S EXHIBIT 22

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

(AR-18J)

Jeffry C. Muffat
3M Environmental Technology and Services
P.O. Box 33331
St. Paul, Minnesota 55133-3331

Dear Mr. Muffat:

Thank you for your letter of January 16, 2002, discussing a possible registry system for emission reduction credits in Illinois. I also appreciate the time you spent in my office discussing this topic.

Your letter highlights the key role that the State of Illinois would play if there is to be a registry system as you propose. We offer states considerable flexibility, not just in designing such systems but in deciding even whether to adopt such a system. I am pleased that you have met with the State to discuss this proposal. This program would be more possible with the State working with us to design and adopt it.

You ask several specific questions regarding the registry system you propose. We have policy that addresses some of these questions. For example, our prevention of significant deterioration rules define applicability criteria that do not consider emission reductions at other facilities. Other questions you ask are still under debate. For example, we are still formulating our policy on implementation of the 8-hour ozone and the fine particle ("$PM_{2.5}$") standards. Therefore, we are not able to answer these questions at this time. Finally, some of your questions are best answered in the context of a specific program design. For example, application of the policy on credit life given in our economic incentive policy (available at http://www.epa.gov/ttn/oarpg/t1/memoranda/eipfin.pdf, published January 2001 (see especially section 16.15)) is best discussed in the context of specific proposed characteristics and uses of credits.

For these reasons, we suggest that a better approach is for you to propose a specific program design to the State. If the State concludes that your proposed system would improve management of new source offsets or otherwise improve air quality management in the State, then we would be in a better position to develop

specific answers to more of your questions. In that case, we would work with you and the State toward defining answers to your questions that address the particular program under discussion.

Your letter also explains the relationship between a registry system and the existing Emissions Reduction Market System. I appreciate this explanation.

Thank you again for your interest in these issues. We encourage innovative programs that improve environmental management. If you and the State decide that this would be a useful program, I would be pleased to work with you on its design and implementation. If you have further questions, please feel free to contact John Summerhays of my staff at (312) 886-6067.

Sincerely yours,

Bharat Mathur, Director
Air and Radiation Division

cc: David Kolaz, Director
Bureau of Air
Illinois Environmental Protection Agency

RESPONDENT'S EXHIBIT 23

ACTION: Final rule; correction.

SUMMARY: This document corrects errors in the amendatory instructions and paragraph heading regarding EPA's limited approval of Pennsylvania's Regional Haze State Implementation Plan (SIP).

DATES: *Effective Date:* August 13, 2012.

FOR FURTHER INFORMATION CONTACT: Melissa Linden, (215) 814–2096 or by email at *linden.melissa@.epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever "we," "us," or "our" are used we mean EPA. On July 13, 2012 (77 FR 41279), we published a final rulemaking action announcing our limited approval of Pennsylvania's Regional Haze SIP. In this document, we inadvertently provided an incorrect amendatory instruction on page 41284 regarding the addition of an entry to § 52.2020(e)(1), and also omitted a paragraph heading. This action corrects both the erroneous amendatory instruction and the omitted paragraph heading in part 52 for this paragraph.

In rule document 2012–16428, published in the **Federal Register** on July 13, 2012 (77 FR 41279), the following corrections are made:

§ 52.2020 [Corrected]

■ 1. On page 41284 in the third column, amendatory instruction number 2 is revised to read as follows:

"2. In § 52.2020, the table in paragraph (e)(1) is amended by adding an entry for Regional Haze Plan at the end of the table to read as follows:"

■ 2. On page 41284 in the third column, the paragraph designation is revised from "(e)" to "(e)(1)."

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(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 good cause for making today's rule final without prior proposal and opportunity for comment because we are merely correcting an incorrect citation in a previous action. Thus, notice and public procedure are unnecessary. We find that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

Statutory and Executive Order Reviews

Under Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and is therefore 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)). Because the agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedures Act or any other statute as indicated in the Supplementary Information section above, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA. This rule also does 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), nor will it 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 governments, as specified by Executive Order 13132 (64 FR 43255, August 10, 1999). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

This technical correction action does not involve technical standards; 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. The rule also does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). In issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996). EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1998) by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the executive order. This rule does not impose an information collection burden under 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. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA had made such a good cause finding, including the reasons therefore, and established an effective date of August 13, 2012. 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**. This correction for 40 CFR part 52, subpart NN (Pennsylvania) is not a "major rule" as defined by 5 U.S.C. 804(2).

Dated: July 23, 2012.

W.C. Early,

Acting Regional Administrator, EPA Region III.

[FR Doc. 2012–19044 Filed 8–10–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2009–0666; FRL–9712–8]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Illinois; Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a request from the State of Illinois to redesignate the Illinois portion of the Chicago-Gary-Lake County, Illinois-Indiana (IL–IN) area (the Greater Chicago area) to attainment of the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS or standard). The Illinois portion of the Greater Chicago area includes Cook, DuPage, Kane, Lake,

McHenry, and Will Counties and portions of Grundy (Aux Sable and Goose Lake Townships) and Kendall (Oswego Township) Counties. The Illinois Environmental Protection Agency (IEPA) submitted this request on July 23, 2009, and supplemented its request on September 16, 2011. In addition to approval of Illinois' ozone redesignation request, EPA is: (1) Approving the State's plan for maintaining the 1997 8-hour ozone standard through 2025 and the State's 2002 Volatile Organic Compound (VOC) and Nitrogen Oxides (NOx) emission inventories, as revisions to the Illinois State Implementation Plan (SIP) for the Illinois portion of the Greater Chicago area; and (2) approving and finding adequate the State's 2008 and 2025 VOC and NOx Motor Vehicle Emission Budgets (MVEBs).

DATES: This final rule is effective August 13, 2012.

ADDRESSES: EPA has established a docket for this action: Docket ID No. EPA–R05–OAR–2009–0666. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket material is available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Edward Doty, Environmental Scientist, at (312) 886–6057 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Edward Doty, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch, U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6057, *doty.edward@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

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I. What is the background for this rule?
II. What comments did we receive on the proposed rule?
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I. What is the background for this rule?

On July 18, 1997 (62 FR 38856), EPA promulgated an 8-hour ozone standard of 0.08 parts per million (ppm) (85 parts per billion (ppb) or higher exceeds the standard). EPA published a final rule designating and classifying areas under the 1997 8-hour ozone NAAQS on April 30, 2004 (69 FR 23857). In that rulemaking, the Greater Chicago area was designated as nonattainment for the ozone standard. This area was classified as a moderate nonattainment area under subpart 2 of the Clean Air Act (CAA).

On July 23, 2009, IEPA requested redesignation of the Illinois portion of the Greater Chicago area to attainment of the 1997 8-hour ozone standard based on ozone data for the period of 2006–2008. On September 16, 2011, IEPA supplemented the original ozone redesignation request, submitting ozone data for the period of 2008–2010, revising the mobile source emission estimates using EPA's on-road mobile source emissions model, MOVES, and extending the demonstration of maintenance of the ozone standard through 2025, with new MVEBs, but without emission reductions resulting from implementation of EPA's Clean Air Interstate Rule (CAIR).

On March 12, 2010, EPA issued a final rulemaking determining that the entire Chicago-Gary-Lake County, IL-IN area had attained the 1997 8-hour ozone NAAQS based on three years of complete, quality-assured ozone data for the period of 2006–2008, and continuing through 2009[1] (75 FR 12088). On May 11, 2010, EPA issued a final rulemaking redesignating the Indiana portion (Lake and Porter Counties) of the Chicago-Gary-Lake County, IL-IN area to attainment of the 1997 8-hour ozone NAAQS (75 FR 26118).

On February 9, 2012 (77 FR 6743), EPA issued a notice of rulemaking proposing to approve Illinois' request to redesignate the Illinois portion of the Greater Chicago area to attainment of the 1997 8-hour ozone standard, as well as proposing to approve Illinois' ten-year ozone maintenance plan for the area, VOC and NOx MVEBs, and 2002 VOC and NOx emission inventories as revisions of the Illinois SIP. This proposed rulemaking sets forth the basis for determining that Illinois' redesignation request meets the CAA requirements for redesignation for the 1997 8-hour ozone NAAQS. Complete, quality-assured air quality monitoring data in the Greater Chicago area for 2008–2010 and for 2009–2011 show that this area is currently attaining the 1997 8-hour ozone NAAQS. Preliminary data available to date for 2012 are consistent with continued attainment of the 1997 8-hour ozone NAAQS. The quality-assured ozone data in the Greater Chicago area were discussed in the February 9, 2012, proposed rule for this rulemaking (77 FR 6747). Table 1 summarizes the 2009–2011 annual fourth high ozone concentrations and 2009–2011 ozone design values (three-year averages of the annual fourth high daily maximum 8-hour ozone concentrations) for each of the monitoring sites in the Greater Chicago area. These and other ozone data for the Greater Chicago area are also documented at EPA's Web site *http://www.epa.gov/airdata/ad_rep_mon.html.*

TABLE 1—ANNUAL FOURTH HIGH OZONE CONCENTRATIONS AND THREE-YEAR AVERAGES FOR 2009–2011 (CONCENTRATIONS IN PARTS PER MILLION (PPM))

Site Name (site code)	County	2009	2010	2011	Three-year average
4500 W. 123rd Street, Alsip (170310001)	Cook	0.069	0.073	0.071	0.071
3300 E. Cheltenham, Chicago (170310032)	Cook	0.065	0.074	0.079	0.073
Wacker At Adams, Chicago (170310042)	Cook	0.076	0.077	No Data	
5720 S. Ellis Avenue, Chicago (170310064)	Cook	0.060	0.071	0.074	0.068
1000 E. Ohio, Chicago (170310072)	Cook	0.062	0.075	0.074	0.070
7801 Lawndale, Chicago (1703100760	Cook	0.067	0.068	0.073	0.069

[1] The area continued to attain the 1997 8-hour ozone standard based on quality assured ozone data for 2010. See February 9, 2012, proposed rule (77 FR 6743).

TABLE 1—ANNUAL FOURTH HIGH OZONE CONCENTRATIONS AND THREE-YEAR AVERAGES FOR 2009–2011 (CONCENTRATIONS IN PARTS PER MILLION (PPM))—Continued

Site Name (site code)	County	2009	2010	2011	Three-year average
6545 W. Hurlbut, Chicago (170311003)	Cook	0.064	0.070	0067	0.067
729 Houston, Lemont (170311601)	Cook	0.067	0.073	0.069	0.070
1820 S. 51st Avenue, Cicero (170314002)	Cook	0.067	0.068	0.072	0.069
9511 W. Harrison Street, Chicago (170314007)	Cook	0.057	0.064	0.065	0.062
750 Dundee Road, Northbrook (170314201)	Cook	0.069	0.072	0.076	0.072
531 E. Lincoln, Evanston (170317002)	Cook	0.064	0.067	0.078	0.070
Route 53 (170436001)	DuPage	0.059	0.064	0.068	0.064
665 Dundee Road, Elgin (170890005)	Kane	0.068	0.069	0.070	0.069
Golf and Jackson Streets, Waukegan (170971002)	Lake	0.057	0.074	No Data	
Illinois Beach State Park, Zion (170971007)	Lake	0.075	0.078	0.076	0.076
First Street and Three Oaks Road, Cary (171110001)	McHenry	0.066	0.065	0.071	0.67
36400 S. Essex Road (171971011)	Will	0.063	0.065	0.061	0.063
201 Mississippi Street, Gary (180890022)	Lake	0.058	0.064	0.066	0.063
1751 Oliver Street, Whiting (180890030)	Lake	0.062	0.069	0.069	0.067
1300 141 Street, Hammond (180892008)	Lake	0.065	0.069	0.072	0.069
84 Diana Road, Ogden Dunes (181270024)	Porter	0.067	0.067	0.068	0.067
1000 Wesley/Valparaiso Water Department (181270026)	Porter	0.064	0.061	0.063	0.063
Chiwaukee Prairie, Pleasant Prairie (550590019)	Kenosha	0.071	0.081	0.081	0.078

The primary background for today's action is contained in EPA's February 9, 2012, proposal to approve Illinois' redesignation request, and in EPA's March 12, 2010, final rulemaking determining that the area has attained the 1997 8-hour ozone NAAQS. In these rulemakings, we noted that, under EPA regulations at 40 CFR 50.10 and 40 CFR part 50, appendix I, the 1997 8-hour ozone standard is attained when the three-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations is less than or equal to 0.08 ppm at all ozone monitoring sites in an area. See 69 FR 23857 (April 30, 2004) for further information. To support the redesignation of the area to attainment of the NAAQS, the area must show attainment based on complete, quality-assured data for the most recent three-year period. The data completeness requirement, for any given monitoring site, is met when the three-year average of days with valid ambient monitoring data is greater than 90 percent, and no single year has less than 75 percent data completeness, as determined in accordance with appendix I of 40 CFR part 50. Under the CAA, EPA may redesignate a nonattainment area to attainment if sufficient, complete, quality-assured data are available demonstrating that the area has attained the standard and if the State meets all applicable redesignation requirements specified in section 107(d)(E) and section 175A of the CAA.

The February 9, 2012, proposed rule provides a detailed discussion of how Illinois' ozone redesignation request meets the CAA requirements. Complete, quality-assured and certified air quality monitoring data in the Greater Chicago area for 2009–2011 and preliminary data available for 2012 show that this area is currently attaining the 1997 8-hour ozone NAAQS. With the final approval of its VOC and NOx emission inventories, Illinois has met all CAA requirements for redesignation of the Illinois portion of the Greater Chicago area to attainment for the 1997 8-hour ozone NAAQS. Illinois has demonstrated that attainment of the 1997 8-hour ozone NAAQS will be maintained in the Greater Chicago area through 2025 with or without the implementation of EPA's CAIR. Finally, Illinois has adopted 2008 and 2025 MVEBs that are supported by Illinois' ozone maintenance demonstration and adopted ozone maintenance plan.

II. What comments did we receive on the proposed rule?

EPA provided a 30-day review and comment period for the February 9, 2012, proposed rule. During the comment period, we received one comment set from an individual representing the Sierra Club. These comments are summarized and addressed below.

Comment 1: The commenter argues that it is inappropriate to redesignate the Illinois portion of the Greater Chicago area to attainment under the 1997 8-hour ozone standard when EPA intends to designate this area as nonattainment under the 2008 8-hour ozone standard, and asserts that EPA is delaying the implementation of the 2008 8-hour ozone standard.

Response 1: We disagree with the commenter. The area's status with respect to the 2008 8-hour ozone standard is not relevant to the area's attainment status under the 1997 8-hour ozone standard. It would be inappropriate to defer or reject the redesignation of the area under the 1997 8-hour ozone standard based on EPA's designation of the area under the 2008 8-hour ozone standard.

On June 11, 2012, EPA published its designation for the Chicago-Naperville, IL-IN-WI area for the 2008 ozone standards. 77 FR 34221. EPA designated the Chicago-Naperville, IL-IN-WI area as nonattainment with a classification of marginal for the 2008 ozone standards. The area's status with respect to the 2008 ozone standards, however, does not affect or prevent redesignation of the area to attainment for the 1997 ozone standard. The 1997 ozone standard currently remains in effect, and, thus, EPA continues to evaluate the area's designation status with respect to that standard. Until the 1997 8-hour ozone standard is revoked, it remains in effect and independent of the 2008 8-hour ozone standards, and EPA continues to evaluate and act upon states' redesignation requests with respect to the 1997 ozone standard.

EPA has in the past continued to redesignate areas under existing standards even after the adoption of new standards for the same pollutant. After adopting the 1997 8-hour ozone standard, EPA continued to redesignate areas for the 1-hour ozone standard

until the 1-hour ozone standard was revoked. See, for example the Cincinnati ozone redesignation for the 1-hour ozone standard, 70 FR 35946 (June 21, 2005) and the Atlanta ozone redesignation for the 1-hour ozone standard, 70 FR 34660 (June 15, 2005).

Subsequent to the adoption of the 2008 8-hour ozone standard and designation of areas for this standard, EPA has continued to redesignate areas to attainment for the 1997 8-hour ozone standard. See, for example, the Detroit, Michigan redesignation, 74 FR 30950 (June 29, 2009); Clearfield and Indiana Counties, Pennsylvania redesignation, 74 FR 11674 (March 19, 2009); Kewaunee County, Wisconsin redesignation, 73 FR 29436 (May 21, 2008); and, Door and Manitowoc Counties, Wisconsin redesignation, 75 FR 39635 (July 12, 2010). Also see the redesignation of the Illinois portion of the St. Louis area for the 1997 8-hour ozone standard, 77 FR 34819 (June 12, 2012).

Comment 2: The commenter argues that EPA has failed to consider ambient monitoring data from 2011 even though Illinois has already submitted and certified these data. The commenter asserts that the EPA must include these data in its consideration of Illinois' ozone redesignation request and provide the public with the opportunity to review and comment on these data before making any final decision on Illinois' ozone redesignation request.

Response 2: At the time EPA prepared the proposed rule for rulemaking on Illinois' ozone redesignation request, EPA had not yet received Illinois' certification of the 2011 ozone data. At the time of EPA's proposed redesignation of the area, the 2008–2010 ozone data were the most recent three years of State-certified data available to EPA. Illinois has subsequently certified its 2011 ozone data for the Illinois portion of the Greater Chicago area.

Indiana has certified its 2011 ozone data for the Indiana portion of the Greater Chicago area. In addition, Wisconsin has certified the 2011 ozone data for the Chiwaukee Prairie monitoring site in Kenosha County, generally considered to be the peak ozone design value site attributable to emissions in the Greater Chicago area.

The complete, certified 2011 ozone data, along with ozone data for 2009 and 2010, show that the Greater Chicago area continues to attain the 1997 8-hour ozone standard. The highest 8-hour ozone design value for the 2009–2011 period was recorded at the Chiwaukee Prairie monitoring site, with a value of 0.077 parts per million. All of these data show that the area continued to attain the 1997 8-hour ozone standard during the 2009–2011 period. Preliminary ozone data for 2012 for the Greater Chicago area and for Chiwaukee Prairie are consistent with the Greater Chicago area's continued attainment of the 1997 8-hour ozone standard. EPA has, thus, considered these data, which reflect continued attainment of the 1997 8-hour ozone standard. Although the 2011 data were not certified at the time of proposal, these data were available to the public through EPA's Air Quality System and commenters could have reviewed the data and addressed them in comments.

Comment 3: The commenter asserts that the consideration of the 2011 data is particularly important because 2008 (the attainment year used by the IEPA to document the emissions reduction-basis for the attainment of the ozone standard in the Chicago-Gary-Lake County, IL–IN area and the base year for the 10-year ozone standard maintenance demonstration) was the first year of a major recession. The commenter contends that emission reductions leading to the observed air quality improvement were the result of temporary economic conditions rather than the result of permanent emission reductions.

Response 3: First, as set forth in EPA's response to comment 2 above, EPA has considered the complete, quality assured and certified monitoring data for the bi-state nonattainment area for 2011. These data show that the area has continued to attain the 1997 8-hour ozone standard, and preliminary data for 2012 are consistent with continued attainment. A determination of attainment is based solely on air quality considerations, and, therefore, underlying economic conditions are not relevant to the limited inquiry that results in a determination. In another portion of this rulemaking, and with respect to a separate and independent criterion for redesignation under section 107(d)(3)(E)(iii), EPA examines whether attainment is due to permanent and enforceable emission reductions. See discussion in the proposed rulemaking (77 FR 6743, February 9, 2012) and elsewhere in these responses to comments.

The commenter provides no data to demonstrate that the economic recession of recent years had any impact on emissions in 2008. The commenter merely speculates that there was such an impact. Lacking any data to the contrary, we see no reason to assume that the lower emissions of 2008 (relative to those of the base nonattainment year of 2002) were exclusively or predominantly an artifact of temporary emission reductions resulting from the economic recession.

In addition, the Chicago-Gary-Lake County, IL–IN area has continued to attain the 1997 ozone standard over an extended period (over a number of sequential three-year periods, 2006–2008, 2007–2009, 2008–2010, and now 2009–2011), with general downward trends in ozone design values at most monitoring sites in the area (see Table 1 in the proposed rule for this rulemaking action, 77 FR 6747). Given the downward trend in ozone design values and the ozone design values below the 0.085 ppm ozone standard violation level, we see no reason to believe that a reversal in the economic situation in this area will cause a return to violation of the 1997 8-hour ozone standard in this area in the foreseeable future.

Comment 4 General: The commenter argues that Illinois and EPA have failed to comply with the ozone redesignation requirement of section 107(d)(3)(E)(iii) of the CAA, which requires that the observed improvement in air quality be due to permanent and enforceable emission reductions resulting from the State's implementation of its SIP and implementation of applicable Federal air pollution control requirements and other permanent and enforceable emission reductions. The commenter argues, in particular, that EPA relied on several emission control programs that are not permanent and enforceable. These questioned emission controls are specified in the following:

Comment 4a: The commenter asserts that the NO_X SIP call is not permanent and enforceable. The commenter notes that EPA found that the NO_X emission reductions leading to attainment in the Greater Chicago area were due, in part, to the implementation of the NO_X SIP call. The commenter argues that the NO_X SIP call cannot be assumed to be permanent and enforceable because it has been replaced, and, therefore, no longer exists. In addition, the NO_X SIP call is implemented through a cap-and-trade program, which means that no actual NO_X emission reduction may have been required for any specified source upwind of the high ozone areas in the Greater Chicago area. The commenter cites a 2009 decision by the D.C. Circuit Court of Appeals, which the commenter believes held that EPA cannot use cap-and-trade programs to satisfy an area-specific statutory mandate. See *NRDC* v. *EPA*, 571 F.3d 1245, 1257 (D.C. Cir. 2009).

Response 4a: EPA disagrees with the commenter's position that emission reductions associated with the NO_X SIP call cannot be considered to be

permanent and enforceable. The commenter's first argument—that the NO_X emission reductions are not permanent and enforceable because the NO_X SIP call has been replaced—is based on a misunderstanding of the relationship between the CAIR and the NO_X SIP call. While the CAIR ozone-season trading program replaced the ozone-season NO_X trading program developed in the NO_X SIP call (70 FR 25290), nothing in the CAIR relieved states of their NO_X SIP call obligations. In fact, in the preamble to CAIR, EPA emphasized that the states and certain units covered by the NO_X SIP call but not by CAIR must still satisfy the requirements of the NO_X SIP call. EPA provided guidance regarding how such states could meet these obligations.[2] In no way did EPA suggest that states could disregard their NO_X SIP call obligations. (70 FR 25290). For NO_X SIP call states, the CAIR NO_X ozone season program provides a way to continue to meet the NO_X SIP call obligations for electric generating units (EGUs) and large non-electric generating units (nonEGUs). In addition, the anti-backsliding provisions of 40 CFR 51.905(f) specifically provide that the provisions of the NO_X SIP call, including the statewide NO_X emission budgets, continue to apply.

In summary, the requirements of the NO_X SIP call remain in force. They are permanent and enforceable as are state regulations developed to implement the requirements of the NO_X SIP call.

EPA also disagrees with the commenter's second argument—that the emission reductions associated with the NO_X SIP call cannot be considered permanent and enforceable because the NO_X SIP call provides for a trading program. There is no support for the commenter's argument that EPA must ignore all emission reductions achieved by the NO_X SIP call simply because the mechanism used to achieve the emission reductions is an emissions trading program. As a general matter, trading programs establish mandatory caps on emissions and permanently reduce the total emissions allowed by sources subject to the programs. The emission caps and associated controls are enforced through the associated SIP rules or Federal Implementation Plans (FIPs). Any purchase of allowances and increase in emissions by a utility necessitates a corresponding sale of allowances and results in an emission reduction by another utility. Given the regional nature of ozone formation and transport, the emission reductions will have an air quality benefit that will compensate, at least in part, for the impact of any emission increase.

In addition, the case cited by the commenter, *NRDC* v. *EPA,* 571 F.3d 1245 (D.C. Cir. 2009), does not support the commenter's position. The case addressed EPA's determination that the CAA nonattainment area RACT requirement was satisfied by the NO_X SIP call trading program. The court held that, because EPA had not demonstrated that the trading program would result in sufficient emission reductions within a nonattainment area, its determination that the program satisfied RACT was not supported. Id. 1256–58. The court explicitly noted that EPA might be able to reinstate the provision providing that compliance with the NO_X SIP call satisfies NO_X RACT for EGUs for particular nonattainment areas if, upon conducting a technical analysis, it could demonstrate that the NO_X SIP call results in greater emissions reductions in a nonattainment area than would be achieved if RACT-level controls were installed in that area. Id. at 1258. In this case, EPA's comparison of emissions in 2002 and 2008 in this rulemaking necessarily looked only at changes in emissions "in the nonattainment area." As such, the commenter's reliance on *NRDC* v. *EPA* is misplaced.

Comment 4b: The commenter contends that EPA cannot rely on the Cross State Air Pollution Rule (CSAPR) to provide permanent and enforceable emission reductions because the implementation of this rule has been stayed by the U.S. Court of Appeals for the District of Columbia Circuit. The commenter contends that this stay makes CSAPR neither permanent nor enforceable. In addition, the commenter notes that CSAPR is to be implemented through a cap-and-trade program, and, therefore, as summarized in Comment 4a, CSAPR cannot be relied on to produce permanent and enforceable emission reductions. Further, EPA cannot take credit for the promise of any emission control program that would replace CSAPR should the Court remand or vacate CSAPR.

Response 4b: Illinois has not relied on CSAPR to demonstrate that attainment was due to permanent and enforceable emission reductions or to demonstrate that it will maintain the standard. EPA did not credit Illinois with NO_X emission reductions from the implementation of CSAPR for attainment or maintenance of the 1997 ozone standard. While CSAPR was listed by the State as a possible contingency measure in the State's ozone maintenance plan, EPA did not credit Illinois with NO_X emission reductions resulting from the implementation of CSAPR, nor did the State take credit for any such emission reduction when demonstrating maintenance of the 1997 ozone standard. As such, the stay of CSAPR is not relevant here.

In addition, modeling performed by EPA during the CSAPR rulemaking process also demonstrates that the counties in the Greater Chicago area will have ozone levels below the 1997 8-hour ozone standard in both 2012 and 2014 without emission reductions from CSAPR or CAIR, with the highest value for any county in the area projected to be 81.1 ppb without the implementation of CSAPR/CAIR-based emission controls. See "Air Quality Modeling Final Rule Technical Support Document," Appendix B, pages B–9, B–10, B–11, and B–33, which is available in the docket for this rulemaking.

Although Illinois did list the "Cross-State Air Pollution Rule" as a possible contingency measure in the ozone maintenance plan, this measure is only one of many that may be selected should the contingency plan be triggered. EPA has concluded, in its consideration of the ozone maintenance plan contingency measures, that there are other contingency measures sufficient to satisfy the requirements of section 175A of the CAA, without the consideration of CSAPR.

With regard to the commenter's assertion that EPA cannot rely on the emission reductions resulting from the implementation of CSAPR because CSAPR would be implemented through the application of an emissions trading program, see our response to the commenter's similar comment with regard to emissions trading under EPA's NOx SIP call in the response to comment 4a above. In addition, CSAPR contains assurance provisions that guarantee that emission reductions will occur in specific states.

Comment 4c: The commenter asserts that Illinois emission control rules are not permanent and enforceable. To support this assertion, the commenter argues that Illinois' Consumer Products and Architectural and Industrial Coatings (AIM) rules have been adopted only by the State, and that, until these rules are approved by the EPA and incorporated into the SIP they cannot be relied upon for redesignation.

Response 4c: EPA in fact finalized approval of Illinois' consumer products and AIM rules on June 7, 2012, at 77 FR 33659. Thus, the commenter's concern

[2] EPA guidance regarding the NO_X SIP call transition to CAIR can be found at *http://www.epa.gov/airmarkets/progsregs/cair/faq-10.html.* EPA guidance regarding the NO_X SIP call transition for the Cross-State Air Pollution Rule (CSAPR) can be found at *http://www.epa.gov/crossstaterule/faqs.html.*

is moot. Moreover, EPA wishes to note that it is not necessary for every change in emissions between the nonattainment year (in this case 2002) and the attainment year (2008) to be permanent and enforceable. Rather, the improvement in air quality necessary for the area to attain must be reasonably attributable to permanent and enforceable reductions in emissions. As discussed in the proposed rule at 77 FR 6754 (February 9, 2012), Illinois and upwind areas have implemented a number of permanent and enforceable regulatory control measures which have reduced emissions and have resulted in a corresponding improvement in ozone air quality. Even if EPA did not finalize action on Illinois' consumer products and AIM rules before completing action on the State's ozone redesignation request, these emission reductions are not necessary to demonstrate that the improvement in air quality is reasonably attributable to permanent and enforceable emission reductions.

Comment 4d: The commenter asserts that the use of 2008 air quality data is inappropriate to demonstrate that the attainment of the 1997 8-hour ozone standard is due to the implementation of permanent and enforceable emission reductions. The commenter claims that EPA simply documented the changes in emissions between 2002 and 2008 to demonstrate that the observed ozone air quality improvement is due to permanent and enforceable emission reductions during this period. The commenter contends that this is unacceptable for a number of reasons.

First, the commenter asserts that EPA has done nothing to connect the emission changes with air quality impacts. The commenter claims that EPA has conducted no analyses to prove that emission reductions between 2002 and 2008 have led to reduced ozone concentrations and attainment of the 1997 8-hour ozone standard.

Second, the commenter argues that using a single attainment year, 2008, is arbitrary because, as explained in preceding comments, the impact of cap-and-trade emission control programs, such as the NO_X SIP call and CSAPR, can cause emissions to vary over time and location as sources buy, sell, and trade emission allowances.

Third, the commenter characterizes the choice of 2008 is further problematic because 2008 marked the beginning of a large economic recession in this country. The commenter contends that this resulted in decreased electricity demand, decreased automobile, truck, and shipping traffic, and decreased factory production. The commenter contends that EPA makes the "unsupported and implicit conclusion" that monitored changes in ozone levels between 2002 and 2008 were due to the implementation of permanent and enforceable emission controls rather than to changes in meteorology, economic conditions, temporary, or voluntary (not enforceable) emission controls. The commenter asserts that EPA provides no analysis showing that the recession was not the cause of the 2002–2008 emission reduction and observed ozone air quality improvement.

Finally, the commenter argues that EPA has not shown that the 2008 emissions inventory reflects permanent and enforceable emission reductions occurring between 2002 and 2008. The 2008 emissions inventory appears to be the "actual" or the "projected" emissions from an unidentified group of sources. The commenter argues that there is a significant difference between what sources actually emit and what sources are allowed to emit, and that the IEPA and EPA have incorrectly assumed that allowable emissions are equal to actual emissions.

Response 4d: EPA's conclusion here is fully supported by the facts and applicable legal criteria. EPA policy [3] and longstanding practice allows states to demonstrate permanent and enforceable emission reductions by comparing emissions occurring during the nonattainment period (represented by emissions during one of the years in the three-year period used to designate an area as nonattainment,[4] in this case 2002) with emissions occurring during the attainment period (represented by emissions during one of the three attainment years, in this case 2008, which is part of the three-year period, 2006–2008, in which Chicago-Gary-Lake County, IL–IN area first attained the 1997 8-hour ozone standard). In EPA's determination of attainment and proposed approval of the redesignation request, EPA considered data for the 2008–2010 time period, which was then the most recent quality-assured, certified three years of data available. See 77 FR 6743, 6746 (February 9, 2012). Therefore, selecting 2008 as the representative attainment year and comparing emissions for this year to those of the representative violation year, 2002, is an appropriate and long-established approach that demonstrates emission reductions in the period between the years of nonattainment and attainment. These emission reductions, therefore, can be reasonably seen to account for the observed air quality improvement.

EPA disagrees with the commenter's assertion that EPA has conducted no analyses to prove that emission reductions between 2002 and 2008 led to reduced ozone concentrations. EPA's analyses included comparison of emissions for the representative nonattainment year to the emissions for the representative attainment year. This comparison, which established the existence of significant emission reductions that resulted in attainment, and also linked these emission reductions to control measures, is consistent with longstanding practice and EPA policy for making such a demonstration. As noted in the proposed rulemaking for this redesignation (77 FR 6754, February 9, 2012), the State of Illinois documented changes in VOC and NO_X emissions between 2002 and 2008 in the Illinois portion of the Greater Chicago area and the emission control measures that have been implemented in the Illinois portion of the Greater Chicago area. These emission control measures resulted from the State's adoption and implementation of regulations, including regulations to: Control NO_X emissions at electric generating utilities and large industrial combustion sources under EPA's NO_X SIP call; control emissions and implement New Source Performance Standards (NSPS), National Emission Standards for Hazardous Air Pollutants (NESHAPS), and Maximum Available Control Technology (MACT) standards for new sources; control VOC solvent emissions for aerosol coatings and AIM coatings and consumer solvents; control vehicle emissions through the implementation of enhanced vehicle inspection and maintenance; control vehicle refueling emissions; and control vehicle evaporative emissions through use of low volatility fuels and reformulated gasoline. In addition to the State's implementation of state-specific emission control measures, Federal emission control measures have also been implemented in the Greater Chicago area, including: Tier 2 emission standards for vehicles; Tier 4 nonroad diesel engine standards; marine compression-ignition engine standards; and locomotive engine standards. As noted in the February 9, 2012, proposed rule, all of these emission controls have been implemented since the 2001–2003 ozone standard violation period for the Greater Chicago area. Therefore, it is

[3] See September 4, 1992, memorandum from John Calcagni entitled "Procedures for Processing Requests to Redesignate Areas to Attainment," pp. 4 and 8–9.

[4] The nonattainment designation of the Greater Chicago area for the 1997 8-hour ozone standard was based on 2001–2003 ozone data.

reasonable to conclude that the emission reductions resulting from these emission controls contributed to the attainment of the 1997 8-hour ozone standard in the Greater Chicago area. See the February 9, 2012, proposed rule (77 FR 6754 and 6759) for discussions of implemented emission control measures and how Illinois derived the 2002 and 2008 VOC and NO_X emissions, demonstrating emission reductions between the 2002 violation year and 2008 attainment year.

The State demonstrated that the implementation of these emission controls along with other ongoing emission controls resulting from continued implementation of the Illinois SIP have led to the emission reductions used to demonstrate the emissions reduction in this area. To derive the 2008 emissions, the State determined source category-specific emission control factors associated with the implemented emission controls. Note that the State applied emission control factors only for those source categories covered by State or Federal emission control requirements and for specific sources subject to permanent, enforceable source closures. The State took no credit for temporary or non-permanent emission reductions resulting from voluntary emission control measures or source activity downturn resulting from the current downturn in the economy. The source category-specific emission control factors, along with source category-specific growth factors, were applied to the 2002 base year emissions to project the 2008 emissions. Emission reductions resulting from source closures occurring between 2002 and 2008 and determined to be permanent (including forfeiture of source permits) were also considered and factored into the emission projections, but produced relatively small emission reductions compared to the impacts of implemented emission controls. Since most source categories had positive growth factors, almost all projected emission reductions can be attributed to the impacts of implemented emission controls. Therefore, the State has demonstrated that the derived emission reduction that occurred between 2002 and 2008 is due to the implementation of emission controls.

The CAA does not specifically require the use of ozone modeling to make a demonstration that the observed ozone air quality improvement is due to permanent and enforceable emission reductions resulting from the implementation of emission controls. It has not been the general practice of states to do so in demonstrating emission reductions for purposes of ozone redesignation requests.

EPA disagrees with the commenter's contention that using emissions from a single attainment year is arbitrary due to the year-to-year variation in emission levels resulting from the implementation of cap-and-trade programs. As a general matter, trading programs establish mandatory caps on emissions and permanently reduce total emissions allowed for sources subject to the programs. The emission caps and associated controls are enforced through the associated SIP rules and FIPs. Any purchase of emission allowances and increase in emissions by a utility necessitates a corresponding sale of emission allowances and reduction in emissions by another utility. Given the regional nature of ozone formation and transport, the emissions reduction will have an ozone air quality benefit that will compensate, at least in part, for the impact of any emission increase.

With respect to NO_X SIP call emission reductions within the Greater Chicago area, there is no evidence of significant temporal variation in emissions levels. In fact, actual emissions from NO_X SIP call sources in the Chicago area have not varied much from year-to-year over the 2003–2011 time period. Some of the largest emitters in the Greater Chicago area that are covered by the NO_X SIP call are operating near full capacity. In addition, an analysis of ozone season NO_X emission rates and total operating hours for all NO_X SIP call sources in this area shows that annual levels of NO_X emission rates (tons per hour of operation) have generally trended downward subsequent to 2003 as a result of the implementation of emission controls.

While the commenter expressed concerns that an economic downturn was responsible for the observed air quality improvement, the commenter has made no demonstration that the reduction in emissions and observed improvement in air quality is due to an economic recession, changes in meteorology, or temporary or voluntary emission reductions. In addition, as noted previously, the CAA does not require modeling to make any such demonstration. There are no data demonstrating that the observed air quality improvement is due to the economic downturn, temporary changes in meteorology, or voluntary emission reductions, and, as discussed above, EPA's modeling for the CSAPR demonstrates that the Greater Chicago area would attain the NAAQS in 2012 and 2014 with or without implementation of CAIR, which is place only temporarily. We, thus, have no reason to believe that factors other than permanent and enforceable emission reductions let to attainment of the 1997 8-hour ozone standard in the Greater Chicago area.

Finally, with regard to consideration of actual versus allowable/permitted emission levels, longstanding practice and EPA policy allows for the use of actual emissions when demonstrating permanent and enforceable emission reductions. Sources seldom emit at maximum allowable emission levels, and assuming that all sources simultaneously operate at maximum capacity would grossly overestimate emission levels. For this reason, EPA believes actual emissions are the appropriate emission levels to consider when comparing nonattainment year emissions with attainment year emissions to demonstrate the basis for improvements in peak ozone levels. EPA also notes that the certified monitoring data establish that the area has been attaining the 1997 8-hour ozone standard continuously during the periods of 2006–2008, 2007–2009, 2008–2010, and 2009–2011, and that EPA's modeling demonstrates that the Greater Chicago area would have attainment air quality in 2012 and 2014 with or without the implementation of CAIR. Emissions reductions have continued during this extended period as the State has continued to implement and enforce emission controls in addition to those required by CAIR.

Comment 5: The commenter claims that EPA has not conducted an adequate analysis of the effect redesignation to attainment will have on attainment and maintenance of other NAAQS under section 110(l) of the CAA. The commenter complains that EPA has failed to conduct an adequate analysis of the ozone redesignation impacts with respect to the 1997 annual fine particulate ($PM_{2.5}$) NAAQS, the 2006 24-hour $PM_{2.5}$ NAAQS, the 1-hour nitrogen dioxide (NO_2) NAAQS, the 1-hour sulfur dioxide (SO_2) NAAQS, and 2008 8-hour ozone NAAQS.

Response 5: Section 110(l) of the CAA provides in part: "the Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * *, or any other applicable requirement of this chapter." As a general matter, EPA must and does consider section 110(l) requirements for every SIP revision, including whether the revision would "interfere with" any applicable requirement. See, e.g., 70 FR 53, 57 (January 3, 2005); 70 FR 17029, 17033 (April 4, 2005); 70 FR 28429,

28431 (May 18, 2005); and 70 FR 58119, 58134 (October 5, 2005).

The Illinois redesignation request and maintenance plan for the 1997 8-hour ozone standard neither revises nor removes any existing emission control requirements. On that basis, EPA concludes that the redesignation will not interfere with attainment or maintenance of any of the air quality standards. Moreover, the maintenance plan itself demonstrates that the emission emissions of NO_X and VOC in the Greater Chicago area will remain at or below the attainment year (2008) levels through 2025, thus demonstrating non-interference with other pollutants, in particular fine pollutants, that are formed through reactions and processes involving NO_X and/or VOC. In addition, contingency measures, if subsequently activated, can be selected to ensure non-interference through lowered emission levels.

The commenter does not provide any information in the comment to indicate that approval of this redesignation would have any impact on the area's ability to comply with any of the referenced NAAQS. In fact, the ozone maintenance plan provided with the State's redesignation request demonstrates a decline in VOC and NO_X emissions over the timeframe of the 10-plus year maintenance period. This reflects the fact that the redesignation does not relax any existing emission control rules or emission limits, nor will the redesignation alter the status quo air quality. The commenter has not explained why the redesignation might interfere with attainment of any standard or with satisfaction of any other CAA requirement, and EPA finds no basis under section 110(l) for EPA to disapprove the SIP revision (ozone maintenance plan and emissions inventories) at issue or to disapprove the requested ozone redesignation.

Comment 6: The commenter asserts that EPA cannot approve Illinois' 2002 emissions inventory as meeting the emission inventory requirement of section 182(a)(1) of the CAA for a number of reasons. In particular, the commenter believes that Illinois' mobile source emission inventories, based on the use of EPA's MOVES model, does not account for the increase VOC and NO_X emissions that would result from the use of up to 15 percent ethanol content in gasoline recently approved by the EPA. The commenter argues that many car and light-duty truck emission control systems are not designed to control vehicle emissions with blends of 15 percent ethanol (Ethanol 15 or E15). The commenter believes that EPA has not accounted for the extra VOC and NO_X emissions that would result from the use of E15.

Response 6: First, it is noted that this comment was directed at EPA's proposed approval of Illinois' 2002 base period emissions. The commenter's concern is not relevant to approval of the 2002 base year emission inventories because the EPA-approved use of E15 fuels was not in place during 2002. The use of E15 fuels was approved by EPA well after 2002. Therefore, the mobile source emissions for 2002 could not have reflected the future use of E15 fuels.

With regard to the use of E15 fuels in later years, it is noted that, in 2010 and 2011, EPA granted partial waivers for the use of E15 fuels in Model Year (MY) 2001 and newer light-duty motor vehicles (75 FR 68094, November 4, 2010 and 76 FR 4662, January 26, 2011). As discussed in the waiver decisions, there may be some small emission impacts for the use of E15. E15 is expected to cause a small immediate emissions increase in NO_X emissions. However, due to its lower volatility than the E10 fuels currently in use, its use is also expected to result in lower evaporative emissions. Other possible emissions impacts may be from the misfueling of E15 in vehicles or engines for which its use is not approved, i.e., MY 2000 and older motor vehicles, heavy-duty engines and vehicles, motorcycles and all non-road engines, vehicles, and equipment. EPA has promulgated a separate rule dealing specifically with the mitigation of misfueling to reduce potential emissions impacts from misfueling (76 FR 44406, July 25, 2011).

EPA's partial waiver for E15 is based on extensive studies done by the Department of Energy, as well as EPA's engineering assessment, to determine the effects on exhaust and evaporative emissions for the vehicle fleet prior to and after the partial waiver. The criteria for granting the waiver was not that there are no emission impacts for E15, but rather that vehicles operating on E15 would not be expected to violate their emission standards in-use.

The E15 partial waivers do not require that E15 be made or sold, and it is unclear if and to what extent E15 may even be used in Illinois. Even if E15 is introduced into commerce in Illinois, considering the likely small and offsetting direction of the emission impacts, the limited set of motor vehicles approved for its use, and the measures required to mitigate misfueling, EPA believes that any potential emission impacts of E15 will be less than the margin of safety by which Illinois shows maintenance of the 1997 ozone standard.

Comment 7: The commenter argues that EPA has not accounted for the effects of changes in weather in its analysis of Illinois' ozone redesignation request. The commenter asserts that EPA should have adjusted monitored ozone levels to account for the varying impacts of meteorology. The commenter contends that EPA cannot approve Illinois' ozone resignation request without a weather adjusted analysis. In addition, the commenter believes that EPA has erred in not considering the impacts that climate change will have on ozone formation during the maintenance period.

Response 7: A determination that an area has attained the 1997 8-hour ozone standard is based on an objective review of the air quality data for a specified period. There are no provisions in the CAA for considering the impacts of changing meteorology and adjusting monitored ozone concentrations to reflect a standardized set of meteorological data or some historical range of meteorological data. Therefore, we disagree with the commenter's argument that EPA should have adjusted ozone levels to assess the impacts of meteorology during the attainment period versus meteorology more reflective of historical high ozone periods. In addition, it should be noted that the very nature of the three-year averaging of ozone concentrations used to assess compliance with the 1997 8-hour ozone standard is used, in part, to negate the impacts of year-to-year variations in meteorology on ozone formation.

By the same reasoning, we also disagree with the commenter that EPA must, in the context of a redesignation rulemaking, consider the impact of climate change on future ozone formation. While EPA agrees that climate change is a serious environmental issue, at this time EPA does not believe that an area-specific climate change analysis must occur in the context of rulemaking on a redesignation request and maintenance plan. Even if EPA chose to make such an assessment, it is virtually impossible, especially given the relatively limited spatial and temporal focus of a redesignation request and related maintenance plan, to project or predict the local meteorological changes that might result from climate change. Current modeling uncertainties result in conflicting projections of the spatial patterns of future changes in meteorological variables and the specific regional distributions of future ozone changes across the United States.

Modeling guidance is not yet available for the type of area-specific analysis of effects or climate change on ozone concentrations required for SIP planning. EPA, therefore, believes it is premature to require a precise mathematical accounting in the SIP process for the effect of higher ambient temperatures due to climate change on ozone concentrations. EPA is ready to reevaluate this position when the state of science and confidence in projection improve. Given the above, at this time, EPA is not in a position to forecast the impact climate change may have on future ozone considerations with the specificity needed for evaluating a state's ozone maintenance demonstration. See EPA's similar reasoning in its approval of Kentucky's section 110(a)(1) maintenance for Huntington-Ashland, Kentucky, 76 FR 21853 (April 14, 2011). Finally, EPA notes that the Greater Chicago area has continued to attain the 1997 8-hour ozone standard since the 2006–2008 monitoring period, and that its attainment of the standard has withstood the challenges of meteorological variability for many years longer than required. Elsewhere in this notice, EPA has addressed extensively its reasoning for concluding, as required for redesignation, that attainment is due to permanent and enforceable emissions reductions, rather than to unduly favorable meteorology.

Conclusion of Comment Review and Response

We conclude that none of the comments discussed above provides a basis for precluding EPA from finalizing the actions we proposed on February 9, 2012.

III. What actions is EPA taking?

After reviewing Illinois' ozone redesignation request, EPA has determined that it meets the redesignation criteria set forth in section 107(d)(3)(E) f the CAA. Therefore, EPA is approving the redesignation of the Illinois portion of the Greater Chicago area to attainment of the 1997 8-hour ozone NAAQS. EPA is also approving Illinois' ozone maintenance plan for the Illinois portion of the Greater Chicago area as a revision of the Illinois SIP based on Illinois' demonstration that the plan meets the requirements of section 175A of the CAA. EPA is approving the 2002 VOC and NO_X emission inventories for the Illinois portion of the Greater Chicago area as meeting the requirements of section 182(a)(1) of the CAA. Finally, EPA is also approving and finding adequate Illinois' 2008 and 2025 VOC and NO_X MVEBs for the Illinois portion of the Greater Chicago area. For 2008, these MVEBs are 117.23 tons per ozone season weekday for VOC and 373.52 tons per ozone season weekday for NO_X. For 2025, these MVEBs are 48.13 tons per ozone season weekday for VOC and 126.27 tons per ozone season weekday for NO_X.

In accordance with 5 U.S.C. 553(d), EPA finds there is good cause for this action to become effective immediately upon publication. This is because a delayed effective date is unnecessary due to the nature of a redesignation to attainment, which relieves the area from certain CAA requirements that would otherwise apply to it. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rulemaking activities may become effective less than 30 days after publication if the rule "grants or recognizes an exemption or relieves a restriction," and section 553(d)(3), which allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule." The purpose of the 30-day waiting period prescribed in section 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today's rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today's rule relieves the State of planning requirements for this 8-hour ozone nonattainment area. For these reasons, EPA finds good cause under 5 U.S.C. 553(d)(3) for this action to become effective on the date of publication of this action.

IV. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by State law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, these actions do not impose additional requirements beyond those imposed by State law and the CAA. For that reason, these actions:

- Are not "significant regulatory actions" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Do 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);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and,
- Do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, 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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 12, 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

40 CFR Part 52

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

40 CFR Part 81

Air pollution control, Environmental protection, National parks, Wilderness areas.

Dated: July 27, 2012.

Susan Hedman,

Regional Administrator, Region 5.

40 CFR parts 52 and 81 are 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.*

■ 2. Section 52.726 is amended by adding paragraphs (mm)(2) and (nn) to read as follows:

§ 52.726 Control strategy: Ozone.

* * * * *

(mm) * * *

(2) Approval—Illinois' 2002 volatile organic compounds and nitrogen oxides emission inventories satisfy the emissions inventory requirements of section 182(a)(1) of the Clean Air Act for the Illinois portion of the Chicago-Gary-Lake County, Illinois-Indiana area under the 1997 8-hour ozone standard.

(nn) Approval—On July 23, 2009, and September 16, 2011, Illinois submitted a request to redesignate the Illinois portion of the Chicago-Gary-Lake County, Illinois-Indiana area to attainment of the 1997 8-hour ozone standard. The Illinois portion of the Chicago-Gary-Lake County, Illinois-Indiana area includes Cook, DuPage, Kane, Lake, McHenry, and Will Counties and portions of Grundy (Aux Sable and Goose Lake Townships) and Kendall (Oswego Township) Counties. As part of the redesignation request, the State submitted a plan for maintaining the 1997 8-hour ozone standard through 2025 in the area as required by section 175A of the Clean Air Act. Part of the section 175A maintenance plan includes a contingency plan. The ozone maintenance plan establishes 2008 motor vehicle emissions budgets for the Illinois portion of the Chicago-Gary-Lake County, Illinois-Indiana area of 117.23 tons per day (tpd) for volatile organic compounds (VOC) and 373.52 tpd for nitrogen oxides (NO_X). In addition, the maintenance plan establishes 2025 motor vehicle emissions budgets for the Illinois portion of the Chicago-Gary-Lake County, Illinois-Indiana area of 48.13 tpd for VOC and 125.27 tpd for NO_X.

PART 81—[AMENDED]

■ 3. The authority citation for part 81 continues to read as follows:

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

■ 4. Section 81.314 is amended by revising the entry for Chicago-Gary-Lake County, IL-IN in the table entitled "Illinois—1997 8-Hour Ozone NAAQS (Primary and Secondary)" to read as follows:

§ 81.314 Illinois.

* * * * *

ILLINOIS—1997 8-HOUR OZONE NAAQS (PRIMARY AND SECONDARY)

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [1]	Type
Chicago-Gary-Lake County, IL-IN:				
Cook County	8/13/2012			
DuPage County		Attainment.		
Grundy County (part).				
Aux Sable Township.				
Goose Lake Township.				
Kane County.				
Kendall County (part).				
Oswego Township.				
Lake County.				
McHenry County.				
Will County.				
*	*	*	*	*	*	*

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is June 15, 2004, unless otherwise noted.

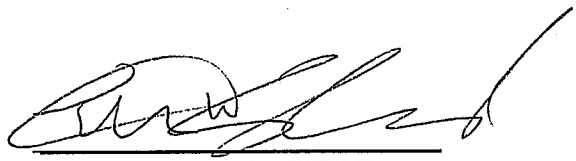
* * * * *

[FR Doc. 2012–19556 Filed 8–10–12; 8:45 am]

BILLING CODE 6560–50–P

CERTIFICATE OF SERVICE

I, THOMAS H. SHEPHERD, do certify that I filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the foregoing Notice of Filing and Respondent's Exhibits in Support of Respondent's Motion for Summary Judgment and caused them to be served this 17th day of August, 2012, upon the persons listed on the foregoing Notice of Filing by electronic mail as per the agreement between the parties to the litigation at or before the hour of 5:00 p.m.



THOMAS H. SHEPHERD