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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2014-0205; FRL-9929-68-Region 6]

Approval and Promulgation of Implementation Plans; New Mexico; Infrastructure for the 2010 Sulfur Dioxide National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve elements of a State Implementation Plan (SIP) submission from the State of New Mexico for the Sulfur Dioxide (SO₂) National Ambient Air Quality Standards (NAAQS). The submittal addresses how the existing SIP provides for implementation, maintenance, and enforcement of the 2010 SO₂ NAAQS (infrastructure SIP or i-SIP). This i-SIP ensures that the State's SIP is adequate to meet the state's responsibilities under the Federal Clean Air Act (CAA).

DATES: Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-R06-OAR-2014-0205, by one of the following methods:

- *www.regulations.gov*. Follow the online instructions.
- E-mail: Sherry Fuerst at *fuerst.sherry@epa.gov*.
- Mail or delivery: Guy Donaldson, Chief, Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733. Deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays, and not on legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R06-OAR-2014-0205. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider

your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: The index to the docket for this action is available electronically at www.regulations.gov and in hard copy at EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

FOR FURTHER INFORMATION CONTACT: Sherry Fuerst, telephone 214-665-6454, fuerst.sherry@epa.gov. To inspect the hard copy materials, please schedule an appointment with her or Bill Deese at 214-665-7253.

SUPPLEMENTARY INFORMATION: Throughout this document wherever "we," "us," or "our" is used, we mean the EPA.

I. Background

On June 22, 2010, EPA revised the primary SO₂ NAAQS (hereafter the 2010 SO₂ NAAQS) to establish a new 1-hour standard, with a level of 75 parts per billion, based on the 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations (75 FR 35520). Each state must submit an i-SIP within three years after the promulgation of a new or revised NAAQS. Section 110(a)(2) of the CAA includes a list of specific elements the i-SIP must meet. EPA issued guidance addressing the i-SIP elements for NAAQS.¹ The Secretary of the

¹ "Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and

New Mexico Environmental Department (NMED) submitted an i-SIP revision to address this revised NAAQS.

EPA is proposing to approve the New Mexico i-SIP submittal for the 2010 SO₂ NAAQS.²

II. EPA's Evaluation of New Mexico's i-SIP Submittal

Below is a summary of EPA's evaluation of the New Mexico i-SIP for each applicable element of 110(a)(2) A-M.³ New Mexico provided a demonstration of how the existing New Mexico SIP met all the requirements of the 2010 SO₂ NAAQS on February 14, 2014. This SIP submission became complete by operation of law on August 14, 2014. *See* CAA section 110(k)(1)(B).

(A) Emission limits and other control measures: The SIP must include enforceable emission limits and other control measures, means or techniques, schedules for compliance and other related matters as needed to implement, maintain and enforce each of the NAAQS.⁴ New Mexico's Environmental Improvement Act (EIA) and Air Quality Control Act (AQCA) provide the Secretary, the NMED and the New Mexico Environmental Improvement Board (EIB) with broad legal authority. They can adopt emission standards and compliance schedules

110(a)(2)," Memorandum from Stephen D. Page, September 13, 2013.

²Additional information on: The history of SO₂, its levels, forms and, determination of compliance; EPA's approach for reviewing i-SIPs; the details of the SIP submittal and EPA's evaluation; the effect of recent court decisions on i-SIPs; the statute and regulatory citations in the New Mexico SIP specific to this review; the specific i-SIP applicable CAA and EPA regulatory citations; Federal Register Notice citations for New Mexico SIP approvals; New Mexico's minor New Source Review program and EPA approval activities; and, New Mexico's Prevention of Significant Deterioration (PSD) program can be found in the Technical Support Document (TSD).

³ A detailed discussion of our evaluation can be found in the TSD for this action. The TSD can be accessed through www.regulations.gov (e-docket EPA-R06-OAR-2014-0205).

⁴The specific nonattainment area plan requirements of section 110(a)(2)(I) are subject to the timing requirements of section 172, not the timing requirement of section 110(a)(1). Thus, section 110(a)(2)(A) does not require that states submit regulations or emissions limits specifically for attaining the 2010 SO₂ NAAQS. Those SIP provisions are due as part of each state's attainment plan, and will be addressed separately from the requirements of section 110(a)(2)(A). In the context of an infrastructure SIP, EPA is not evaluating the existing SIP provisions for this purpose. Instead, EPA is only evaluating whether the state's SIP has basic structural provisions for the implementation of the NAAQS.

applicable to regulated entities; emission standards and limitations and any other measures necessary for attainment and maintenance of national standards; and, enforce applicable laws, regulations, standards and compliance schedules, and seek injunctive relief. This authority has been employed to adopt and submit multiple revisions to the New Mexico State Implementation Plan. The approved SIP for New Mexico is documented at 40 CFR part 52.1620, subpart GG.⁵

(B) Ambient air quality monitoring/data system: The SIP must provide for establishment and implementation of ambient air quality monitors, collection and analysis of monitoring data, and providing the data to EPA upon request.

The AQCA provides the authority allowing EIB and NMED to collect air monitoring data, quality-assure the results, and report the data. New Mexico maintains and operates a SO₂ network to measure ambient levels. All monitoring data is measured using EPA approved methods and subject to the EPA quality assurance requirements. NMED submits all required data to EPA, following the EPA rules. The statewide network was approved into the SIP and it undergoes recurrent annual review by EPA.⁶ In addition, NMED conducts a recurrent assessment of its monitoring network every five years, which includes an evaluation of the need to conduct ambient monitoring for SO₂, as required by EPA rules. The most recent of these 5-year monitoring network assessments was conducted by NMED and approved by EPA.⁷ The NMED website provides the monitor locations and posts past and current concentrations of criteria pollutants measured in the State's network of monitors.⁸

(C) Program for enforcement The SIP must include the following three elements: (1) a

⁵ <https://www.law.cornell.edu/cfr/text/40/52.1620>

⁶ A copy of the 2014 Annual Air Monitoring Network Plan and EPA's approval letter are included in the docket for this proposed rulemaking.

⁷ A copy of the 2010 5-year ambient monitoring network assessment and EPA's approval letter are included in the docket for this proposed rulemaking.

⁸ see <http://air.nmenv.state.nm.us>

program providing for enforcement of the measure in paragraph A above; (2) a program for the regulation of the modification and construction of stationary sources as necessary to protect the applicable NAAQS (i.e., state-wide permitting of minor sources); and (3) a permit program to meet the major source permitting requirements of the CAA (for areas designated as attainment or unclassifiable for the NAAQS in question).⁹

(1) *Enforcement of SIP Measures.* As noted in (A), the state statutes provide authority for the Secretary, EIB and the NMED to enforce the requirements of the AQCA, and any regulations, permits, or final compliance orders. Its statutes also provide the Secretary, the NMED and the EIB with general enforcement powers. Among other things, they can file lawsuits to compel compliance with the statutes and regulations; commence civil actions; issue field citations; conduct investigations of regulated entities; collect criminal and civil penalties; develop and enforce rules and standards related to protection of air quality; issue compliance orders; pursue criminal prosecutions; investigate, enter into remediation agreements; and issue emergency cease and desist orders. The AQAC also provides additional enforcement authorities and funding mechanisms.

(2) *Minor New Source Review (NSR).* The SIP is required to include measures to regulate construction and modification of stationary sources to protect the NAAQS. New Mexico's minor NSR permitting requirements are approved as part of the SIP.¹⁰

(3) *Prevention of Significant Deterioration (PSD) permit program.* New Mexico's PSD

⁹ As discussed in further detail in the TSD.

¹⁰ EPA is not proposing to approve or disapprove New Mexico's existing minor NSR program to the extent that it may be inconsistent with EPA's regulations governing this program. EPA has maintained that the CAA does not require that new infrastructure SIP submissions correct any defects in existing EPA-approved provisions of minor NSR programs in order for EPA to approve the infrastructure SIP for element C (e.g., 76 FR 41076-41079, July 13, 2011). EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs.

portion of the SIP covers all NSR regulated pollutants as well as the requirements for the 2010 SO₂ NAAQS and has been approved by EPA¹¹.

(D) Interstate and international transport: There are four requirements the SIP must include relating to interstate transport. These four requirements are referred to as prongs 1 through 4. Prongs 1 and 2 require adequate provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment, or interfering with maintenance, of any NAAQS in another state. Prong 3 and 4 prohibit interfering with measures required of any other state to prevent significant deterioration of air quality or to protect visibility. In addition, States must comply with requirements to prevent transport of international air pollution.

New Mexico did not address Prongs 1 and 2 in this submission. EPA intends to develop guidance and additional information for the states to address these requirements. We expect that New Mexico will make a SIP submittal for prongs 1 and 2 at a later time.

The necessary provisions for prong 3 are contained in the PSD portion of the SIP. The prong 4 requirement was met by our approval of the regional haze and visibility component of the SIP.

New Mexico's SIP includes provisions that satisfy the CAA interstate pollution abatement requirements prongs 3 and 4. There are no final findings by EPA that New Mexico air emissions affect other countries. Therefore, New Mexico has no international obligations. If EPA makes such a finding, NMED will consult with EPA.

(E) Adequate authority, resources, implementation, and oversight: The SIP must provide for the following: (1) Necessary assurances that the state (and other entities within the state

¹¹As discussed further in the TSD.

responsible for implementing the SIP) will have adequate personnel, funding, and authority under state or local law to implement the SIP, and that there are no legal impediments to such implementation; (2) requirements relating to state boards; and (3) necessary assurances that the state has responsibility for ensuring adequate implementation of any plan provision for which it relies on local governments or other entities to carry out that portion of the plan.

Both elements A and E address the requirement that there is adequate authority to implement and enforce the SIP and that there are no legal impediments.

This i-SIP submission for the 2010 SO₂ NAAQS describes the SIP regulations governing the various functions of personnel within the EIB and NMED, including the administrative, technical support, planning, enforcement, and permitting functions of the program.

With respect to funding, the AQCA requires NMED to establish an emissions fee schedule for sources in order to fund the reasonable costs of administering various air pollution control programs and authorizes NMED to collect additional fees necessary to cover reasonable costs associated with processing of air permit applications. EPA conducts periodic program reviews to ensure that the state has adequate resources and funding to among other things implement and enforce the SIP.

As required by the CAA, the EIA and the SIP stipulate that any board or body, which approves permits or enforcement orders, must have at least a majority of members who represent the public interest and do not derive any "significant portion" of their income from persons subject to permits and enforcement orders or who appear before the board on issues related to the CAA or AQCA. The members of the board or body, or the head of an agency with similar powers, are required to adequately disclose any potential conflicts of interest.

With respect to assurances that the State has responsibility to implement the SIP

adequately when it authorizes local or other agencies to carry out portions of the plan, the EIA and the AQCA designate the NMED as the primary air pollution control agency. The statutes allow for local agencies to carry out some or all of the Act's responsibilities.

There is one local air quality control agency, the Albuquerque/Bernalillo County Air Quality Control Board, which assumes jurisdiction for local administration and enforcement of the AQCA in Bernalillo County. There are Albuquerque/Bernalillo County SIP provisions which are part of the New Mexico SIP.¹²

(F) Stationary source monitoring system: The SIP requires the establishment of a system to monitor emissions from stationary sources and to submit periodic emission reports. It must require the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources, to monitor emissions from sources. The SIP shall also require periodic reports on the nature and amounts of emissions and emissions-related data from sources, and require that the state correlate the source reports with emission limitations or standards established under the CAA. These reports must be made available for public inspection at reasonable times.

The AQCA authorizes the NMED to require persons engaged in operations which result in air pollution to monitor or test emissions and to file reports containing information relating to the nature and amount of emissions. There also are SIP state regulations pertaining to sampling and testing and requirements for reporting of emissions inventories. In addition, SIP rules establish general requirements for maintaining records and reporting emissions.

The NMED uses this information, in addition to information obtained from other sources,

¹² Albuquerque/Bernalillo County SIP
<http://yosemite.epa.gov/r6/Sip0304.nsf/home!OpenView&Start=1&Count=30&Collapse=4.4#4.4> or
<https://www.law.cornell.edu/cfr/text/40/52.1620>

to track progress towards maintaining the NAAQS, developing control and maintenance strategies, identifying sources and general emission levels, and determining compliance with SIP regulations and additional EPA requirements. The SIP requires this information be made available to the public. Provisions concerning the handling of confidential data and proprietary business information are included in the SIP's regulations. These rules specifically exclude from confidential treatment any records concerning the nature and amount of emissions reported by sources.

(G) Emergency authority: The SIP must provide for authority to address activities causing imminent and substantial endangerment to public health or welfare or the environment and to include contingency plans to implement such authorities as necessary.

The AQCA provides NMED with authority to address environmental emergencies, and NMED has contingency plans to implement emergency episode provisions.

Upon a finding that any owner/operator is unreasonably affecting the public health, safety or welfare, or the health of animal or plant life, or property, AQCA authorizes NMED to, after a reasonable attempt to give notice, declare a state of emergency and issue without hearing an emergency special order directing the owner/operator to cease such pollution immediately.

The New Mexico "Air Pollution Episode Contingency Plan for New Mexico," is part of the SIP. However, because of the low levels of SO₂ emissions monitored statewide, New Mexico is not required to have contingency plans for this revised NAAQS. However, to provide additional protection, the State has general emergency powers to address any possible dangerous SO₂ episode if necessary to protect the environment and public health.

(H) Future SIP revisions: States must have the authority to revise their SIPs in response to changes in the NAAQS, availability of improved methods for attaining the NAAQS, or in

response to an EPA finding that the SIP is substantially inadequate to attain the NAAQS.

The AQCA requires the NMED to revise its SIP, as necessary, to account for revisions of the NAAQS, new NAAQS, to attain and maintain the NAAQS, to abate air pollution, to adopt more effective methods of attaining the NAAQS, and to respond to EPA SIP calls.

(I) Nonattainment areas: New Mexico presently does not have any non-attainment areas for SO₂ and EPA believes that nonattainment area requirements should be treated separately from the i-SIP requirements.¹³ If necessary, EPA will take action through a separate rulemaking process on the non-attainment area requirements.

(J) Consultation with government officials, public notification, PSD and visibility protection: The SIP must meet the following three requirements: (1) relating to interagency consultation regarding certain CAA requirements; (2) relating to public notification of NAAQS exceedances and related issues; and, (3) prevention of significant deterioration of air quality and visibility protection.

(1) Interagency consultation: As required by the AQCA, there must be a public hearing before the adoption of any regulations or emission control requirements and all interested persons are given a reasonable opportunity to submit data, view, or arguments orally or in writing and to examine witnesses testifying at the hearing. In addition, the AQAC provides the NMED the power and duty to “advise, consult, contract with and cooperate with local authorities, other states, the federal government and other interested persons or groups in regard to matters of common interest in the field of air quality control...”. Furthermore, New Mexico’s PSD SIP rules mandate that the NMED shall provide for public participation and notification

¹³ This infrastructure SIP rulemaking will not address the New Mexico program for provisions related to nonattainment areas, since EPA considers evaluation of these provisions to be outside the scope of infrastructure SIP actions

regarding permitting applications to any other state or local air pollution control agencies, local government officials of the city or county where the source will be located, tribal authorities, and Federal Land Managers (FLMs) whose lands may be affected by emissions from the source or modification. Additionally, the State's PSD SIP rules require the NMED to consult with FLMs regarding permit applications for sources with the potential to impact Class I Federal Areas. The SIP also includes a commitment to consult continually with the FLMs on the review and implementation of the visibility program, and the State recognizes the expertise of the FLMs in monitoring and new source review applicability analyses for visibility and has agreed to notify the FLMs of any advance notification or early consultation with a major new or modifying source prior to the submission of the permit application. The State's Transportation Conformity SIP rules provide procedures for interagency consultation, resolution of conflicts, and public notification.

(2) *Public Notification:* The i-SIP provides the SIP regulatory citations requiring the NMED to regularly notify the public of instances or areas in which any NAAQS are exceeded. Included in the SIP are the rules for NMED to advise the public of the health hazard associated with such exceedances; and enhance public awareness of measures that can prevent such exceedances and of ways in which the public can participate in the regulatory and other efforts to improve air quality. In addition, as discussed for infrastructure element B above, the NMED air monitoring website provides live air quality data for each of the monitoring stations in New Mexico.⁸ The website also provides information on the health effects of ozone, particulate matter, and other criteria pollutants.

(3) *PSD and Visibility Protection:* The PSD requirements here are the same as those addressed under (C). The New Mexico SIP requirements relating to visibility and regional haze

are not affected when EPA establishes or revises a NAAQS. Therefore, EPA believes that there are no new visibility protection requirements due to the revision of the NAAQS, and consequently there are no newly applicable visibility protection obligations pursuant to infrastructure element J after the promulgation of a new or revised NAAQS.

(K) Air quality and modeling/data: The SIP must provide for performing air quality modeling, as prescribed by EPA, to predict the effects on ambient air quality of any emissions of any NAAQS pollutant, and for submission of such data to EPA upon request.

The NMED has the power and duty, under the AQCA to investigate and develop facts providing for the functions of environmental air quality assessment. Past modeling and emissions reductions measures have been submitted by the State and approved into the SIP. Additionally, New Mexico has the ability to perform modeling for the primary and secondary SO₂ standards and other criteria pollutant NAAQS on a case-by-case permit basis consistent with their SIP-approved PSD rules and with EPA guidance.

The New Mexico AQCA authorizes and requires NMED to cooperate with the federal government and local authorities concerning matters of common interest in the field of air quality control, thereby allowing the agency to make such submissions to the EPA.

(L) Permitting Fees: The SIP must require each major stationary source to pay permitting fees to the permitting authority, as a condition of any permit required under the CAA, to cover the cost of reviewing and acting upon any application for such a permit, and, if the permit is issued, the costs of implementing and enforcing the terms of the permit. The fee requirement applies until a fee program established by the state pursuant to Title V of the CAA, relating to operating permits, is approved by EPA.

See element (E) above for the description of the mandatory collection of permitting fees

outlined in the SIP.

(M) Consultation/participation by affected local entities: The SIP must provide for consultation and participation by local political subdivisions affected by the SIP.

See element J (1) and (2) for a discussion of the SIP's public participation process, the authority to advise and consult, and the PSD SIP's public participation requirements.

Additionally, the AQCA also requires initiation of cooperative action between local authorities and the NMED, between one local authority and another, or among any combination of local authorities and the NMED for control of air pollution in areas having related air pollution problems that overlap the boundaries of political subdivisions, and entering into agreements and compacts with adjoining states and Indian tribes, where appropriate. NMED has a long history of successful cooperation with the local air quality authority in Albuquerque/Bernalillo County and tribal governments. The transportation conformity component of New Mexico's SIP requires that interagency consultation and opportunity for public involvement be provided before making transportation conformity determinations and before adopting applicable SIP revisions on transportation-related issues.

III. Proposed Action

EPA is proposing to approve the February 14, 2014, infrastructure SIP submission from New Mexico, which addresses the requirements of CAA sections 110(a)(1) and (2) as applicable to the 2010 SO₂ NAAQS. Specifically, EPA is proposing to approve the following infrastructure elements, or portions thereof: 110(a)(2)(A), (B), (C), (D), (E), (F), (G), (H), (J), (K), (L), and (M). EPA is not proposing action on section 110(a)(2)(I) – Nonattainment Area Plan or Plan Revisions, nor on the visibility protection portion of section 110(a)(2)(J) as EPA believes these need not be addressed in the i-SIP. Based upon review of the state's infrastructure SIP

submissions and relevant statutory and regulatory authorities and provisions referenced in these submissions or referenced in New Mexico's SIP, EPA believes that New Mexico has the infrastructure in place to address all applicable required elements of sections 110(a)(1) and (2) (except otherwise noted) to ensure that the 2010 SO₂ NAAQS are implemented in the state.

IV. Statutory and Executive Order Reviews

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

EPA is not proposing to approve this infrastructure SIP certification to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, this proposed approval of an infrastructure SIP certification does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference,
Intergovernmental relations, sulfur dioxide reporting and recordkeeping requirements.

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

Dated: June 18, 2015.

Ron Curry,
Regional Administrator, Region 6.

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