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Obama Administration Withdraws Proposed Ozone Standard; Fight Over Air Toxics and Other EPA Rules Expected This Fall

By [Svend Brandt-Erichsen](#)

September 6, 2011

President Obama shelved an EPA proposal to tighten the national air quality standard for ozone, the major component of smog, amid concerns that the nation's weak economy cannot sustain the anticipated cost of the new standard.^[1] EPA is unlikely to take up a more stringent ozone standard until at least 2013, unless the courts intervene. The President's move forestalls further political wrangling over the ozone standard for now, but EPA's regulatory agenda remains in the crosshairs of Republicans in Congress. House Republicans have identified ten regulations they contend are "most harmful" to job creation, including seven EPA regulations, and they plan to hold votes this fall seeking to block or overturn those rules (see sidebar).^[2] This article explains the fight over the ozone standard and provides a preview of the dispute this fall over two more air rules which Republicans have targeted for repeal-- air toxics standards for industrial boilers ("Boiler MACT") and mercury and toxics standards for utilities ("Utility MACT").

I. EPA Revisits the Ambient Ozone Standard

Ozone, a molecule composed of three oxygen atoms, is the primary constituent of smog. It is one of six pollutants for which EPA has set air quality standards that apply throughout the country, called National Ambient Air Quality Standards ("NAAQS"). Sunlight and hot weather cause ozone to form in the lower atmosphere through a chemical reaction between nitrogen oxides and volatile organic compounds ("VOCs").^[3] Across the country, the burning of hydrocarbons – as fuel for cars, power plants, and industrial facilities – is the most significant source of these precursors to ozone.

The Clean Air Act directs EPA to set NAAQS at levels that will protect public health and welfare,^[4] and also requires the agency to review the standards every five years.^[5] EPA has tightened the ozone NAAQS over time,

from 125 parts per billion (“ppb”) in the 1970s to 84 ppb in the 1990s.[6] In March 2008, EPA reset the ozone NAAQS to an 8-hour average of 75 ppb.[7]

The Clean Air Act requires states to impose limits on air emissions as necessary to attain and maintain the NAAQS through federally-approved State Implementation Plans (“SIPs”).[8] Compliance with NAAQS is determined by measuring the concentration of the targeted pollutant in the ambient air around a city or region. If concentrations exceed a NAAQS, the Clean Air Act directs EPA to declare the city or region to be a “nonattainment area,” which triggers more stringent controls on emissions of that NAAQS pollutant or its precursors.[9]

When EPA makes a NAAQS more stringent the number of nonattainment areas increase, and states are required to adopt new, more stringent limitations on emissions. A more stringent ozone standard can mean new limits on major stationary sources, but also on regional transportation systems (the Clean Air Act requires that the air quality impact of highway projects and other transportation infrastructure changes be evaluated before they can receive federal funding).

A. Ozone Standard Litigation and Reconsideration of the Standard

The Clean Air Act requires EPA to appoint a scientific advisory committee to assist it in reviewing NAAQS, which is supposed to occur every five years.[10] EPA was sued in 2003 by the American Lung Association and others because it had been more than five years since the agency had reviewed the ozone standard.[11] EPA negotiated a consent decree with the plaintiffs under which the agency committed to complete review of the ozone NAAQS and finalize any change to the standard by December, 2006.[12] That deadline was subsequently modified, but in March 2008 EPA did take final action, adopting the current 75 ppb ozone NAAQS standard.[13]

The new ozone standard was immediately challenged in the D.C. Circuit Court of Appeals as both too stringent and too lenient.[14] Advocates for a more stringent standard pointed to the recommendations of EPA’s advisory committee, which had suggested a standard between 60 and 70 ppb.[15] Those arguing for a less stringent standard claimed that the costs of meeting the new standard outweighed any potential benefits. Opening briefs were to have been filed in April 2009. However, in March 2009 the incoming Obama administration obtained the consent of the parties and the court to hold the case in abeyance while it re-evaluated whether the 2008 standard met Clean Air Act requirements.

EPA informed the court in September, 2009 that it wanted to reconsider the 2008 standard through notice and comment rulemaking, and that it planned to propose a new rule in December 2009 and to sign a final action in August, 2010. In January 2010, EPA published a proposal to lower the ozone NAAQS to a level between 60 and 70 ppb.[16]

The American Lung Association, several environmental groups, and some states advocated for the lowest level in EPA’s proposed range (60 ppb), arguing that even at that level ozone will impact lung function in some

individuals.[17] Business and industry groups, on the other hand, argued that the costs of a more stringent standard would be far too high, and it should be left at 75 ppb. They pointed to EPA's own regulatory impact analysis, which projected that a 60 ppb standard would cost business and industry \$52 to \$90 billion annually by 2020, and that 85 percent of U.S. counties would likely be designated as nonattainment areas under a 60 ppb ozone standard.[18] Some industry opponents, disputing EPA's economic assumptions, did their own cost analysis and concluded that the cost of attaining a 60 ppb ozone standard could be as high as \$1 trillion a year, equivalent to 5.4% of the nation's gross domestic product.[19] Advocates for a more stringent standard dispute that analysis and argue that the savings in direct and indirect health care-related costs will more than offset implementation costs, and in any event that the Clean Air Act does not allow EPA to consider costs when setting the level of a NAAQS.

B. EPA's Final Decision Delayed

EPA announced in August, 2010 that it would not meet its planned August 31 target date for finalizing the revised ozone NAAQS, and estimated it would be delayed another two months. In December, 2010, after a further delay, EPA announced that it would ask the agency's advisory committee to look again at the epidemiological and clinical studies that formed the basis for its recommendation of a 60 to 70 ppb standard.[20] At that time, EPA said it expected to issue the final standard by the end of July, 2011.

On July 26, 2011 EPA announced that its final decision was undergoing interagency review at OMB, but that it would not meet the July 29 deadline it had set for itself last December. This announcement triggered a return to the legal challenges to the 2008 ozone standard that have been held in abeyance while EPA reconsidered the standard. On August 8, the American Lung Association and others asked the D.C. Circuit Court of Appeals to order EPA to complete reconsideration of the standard immediately.[21] Industry groups responded two days later, arguing that under the Clean Air Act EPA should have five years (until 2013) to review the ozone standard adopted in 2008, and that rather than order EPA to act on its pending reconsideration the court should let the parties proceed with their challenge to the 2008 standard.[22]

C. Political Pressure, Followed By Withdrawal of Proposal

Business and industry groups have been pressuring the Obama administration to delay the new ozone standard for several months. In mid-July, nine representatives of business and industry trade associations met with EPA Administrator Jackson and unsuccessfully attempted to persuade EPA to delay the new ozone standard until 2013, when the Clean Air Act would require EPA to complete review of the 2008 standard in the normal course.[23] On August 3, six of these trade associations sent a joint letter to President Obama asking him to direct EPA to delay the rule until 2013.[24]

There also has been pressure from Congress. On July 12, 2011, the House Energy Committee approved the Transparency in Regulatory Analysis of Impacts on the Nation ("TRAIN") Act, H.R. 2401, that would require an evaluation of the cumulative impact of a number of EPA rules, including any new ozone NAAQS standard, on

jobs and U.S. competitiveness, power prices and the reliability of the electricity grid, and the impact on fuels used in the electric power sector (i.e., the impact on use of coal).[25]

The substance of the TRAIN Act was then incorporated into the fiscal year 2013 appropriations bill for the Department of the Interior, EPA and other agencies, H.R. 2584, that the full House took up in the week before its August recess.[26] The Obama Administration threatened to veto the Interior appropriations bill due to a host of policy riders attached to the bill, including the TRAIN Act provision.[27] The Interior appropriations bill was pulled from the House floor before the amendment process was completed to make way for House action on the debt ceiling legislation. It is unclear whether the House will take up the bill again when it returns in September, or whether the Interior bill will be wrapped into a continuing resolution that aggregates appropriations for the next fiscal year. The TRAIN Act also could still be taken up by the House as a freestanding bill this fall.

In late July, thirty-four senators signed a letter to the EPA Administrator objecting to any tightening of the ozone standard at this time, arguing that EPA should not act until required to do so by the Clean Air Act in 2013. They suggested that the weakened economy cannot sustain the job losses projected to result from implementing a more stringent standard.[28] On August 21, House Republican Majority Leader Eric Cantor published an op-ed piece in the Washington Post identifying the proposed ozone standard, along with the recently finalized cross state emissions transport rule for powerplants, as part of an “anti-business, hyper-regulatory agenda” that is making it harder to create jobs in the United States.[29] Representative Cantor concluded by stating that the Republican agenda in the House of Representatives this fall would include overturning EPA’s proposed regulations that “inhibit jobs.”

On September 2, 2011, President Obama responded to this pressure, announcing that he was requesting Administrator Jackson to withdraw the proposed ozone standard.[30] He said that work was already underway on updating the 2006 review of the science behind the standard to support review of the standard in 2013, and that he could not support asking states and communities to implement a new standard that would be reconsidered in two years.[31] Presumably this decision will result in reactivation of the legal challenges to the 2008 ozone standard. As noted above, those challenges were stayed before opening briefs had been filed.

II. Hazardous Air Pollutant Standards for Boilers and Utilities

In October, the House is expected to hold votes seeking to block hazardous air pollutant standards for utilities and for boilers.[32] While there is no indication these actions will result in legislation that could pass the Senate, they provide the Republicans an opportunity to talk about the impact of environmental regulation on jobs and the economy, along the lines as has already occurred with the proposed ozone standard.

These controversial air quality standards have their genesis in the last major revisions made to the Clean Air Act two decades ago. The 1990 amendments to the Clean Air Act[33] required EPA to identify hazardous (toxic) air pollutant sources by category, and to use information on the best performing sources in each category to

determine the “maximum achievable control technology” (MACT) for new and existing sources in their category. Over the last twenty years, EPA has adopted more than 100 MACT standards.[34] EPA’s attempts to develop MACT standards for industrial boilers and coal- and oil-fired electricity generation have been among the more controversial of these rules. The courts have directed EPA to revise its initial attempts at both of these rules.

A. Boiler MACT

In 2004, EPA adopted a MACT standard for industrial and commercial boilers and process heaters located at facilities that are a major source of hazardous air pollutants, commonly referred to as “Boiler MACT.”[35] Boilers and process heaters are common components of a wide variety of industrial facilities – refineries, pulp and lumber mills, smelters, chemical manufacturers, auto parts makers, glass makers – as well as large institutional facilities, like universities and hospitals. As a result, the Boiler MACT standard affects a broad spectrum of America’s commercial and industrial facilities.

In 2007, the D.C. Circuit Court of Appeals vacated the Boiler MACT standard because it found EPA had differentiated between incinerators (subject to section 129 of the Act) and boilers (subject to section 112) in a way that conflicted with the intent of the statute.[36] There also were challenges to the substance of the standard from both industry and environmental interests, but those were left unresolved by the court’s decision.

EPA then launched a rewrite of the Boiler MACT standard, and issued a new proposed rule in 2010. [37] Once again the rule was controversial, but EPA was under a court-ordered deadline to complete its work and adopt a final standard. EPA asked the court for more time, but that request was denied. EPA then adopted a final version of the Boiler MACT standard in March of 2011,[38] but in the same issue of the Federal Register the Agency announced that it intended to reconsider fourteen specific issues related to the rule, and to take additional comment on those issues.[39] EPA also immediately received petitions to reconsider various other aspects of the Boiler MACT standard, and the rule was challenged in court.

The final Boiler MACT standard sets limits for emissions of mercury, dioxin, particulate matter, hydrogen chloride and carbon monoxide for all new and existing large boilers, and applies to units burning coal, fuel oil, natural gas or biomass. It also sets limits on mercury and carbon dioxide from smaller boilers, but only if they burn coal.

As adopted, the Boiler MACT standard would have taken effect on May 20, 2011. But EPA, bowing to pressure from a variety of sources, announced on May 18 that the effective date of the rule was delayed until EPA completes its reconsideration of the rule or until judicial review of the rule is no longer pending, whichever is earlier.[40]

B. Utility MACT

As with the Boiler MACT standard, EPA has struggled for more than ten years with setting standards from “electric utility steam generating units” (i.e., power plants), referred to in regulatory parlance as EGUs. In December 2000, the outgoing Clinton Administration placed coal- and oil-fired EGUs on the Section 112 source category list, based on a study of their mercury emissions.[41] It excluded natural gas-fired units from the source category.

The Bush Administration preferred a different approach to regulating mercury emissions from power plants, and so launched an effort that included formally removing the EGU source category from the Section 112 list[42] and adopting a mercury cap-and-trade program for these sources (the Clean Air Mercury Rule, or “CAMR”),[43] which was supposed to be implemented by the States. CAMR relied on EPA’s authority to set performance standards under Section 111 of the Clean Air Act, rather than the MACT provisions of Section 112. But in 2008 the D.C. Circuit struck down CAMR, concluding that EPA had not made findings required by Section 112 when it removed EGUs from the source category list, and that under the plain language of the Act the mercury emissions from EGUs should be regulated under Section 112 rather than Section 111.[44] EPA was then sued for having failed to complete a MACT standard for the Utility EGU source category by the statutory deadline (2002), and the Agency agreed to a settlement requiring that a final rule be adopted in November, 2011.

On May 3, 2011, EPA issued a proposed MACT standard for coal- and oil-fired EGUs (“Utility MACT”) that would impose limits on emissions of acid gases and metals as well as mercury[45]. EPA took comments on the proposed Utility MACT standard through August 4, 2011.[46] Like Boiler MACT, the new proposed Utility MACT standard would affect electric utilities across the country, and it is sparking a similar level of controversy.

C. Congressional Efforts to Delay, Change MACT Standards

The Boiler and Utility MACT standards are among the rules that the House’s TRAIN Act, discussed above, would require be part of the cumulative impacts analysis.[47] The bill also would delay implementation of the Utility MACT standard (and the recently finalized cross state emissions rule) until six months after the cumulative impacts report is delivered to Congress. This delay of the Utility MACT standard was incorporated into the Interior appropriations rider based on the TRAIN Act, discussed above.[48]

In the Senate, Senators Susan Collins and Ron Wyden have introduced a bill with bipartisan support that would delay implementation of the Boiler MACT standard for three years.[49] The Senate bill also would make changes or clarifications to the dividing line between boilers and incinerators, the issue that was the downfall of the 2004 version of the Boiler MACT standard. Among other things, the Senate bill would clarify that the burning of specific industrial by-products, such as biomass from pulp and paper mills, is subject to the Boiler MACT rule and not rules for incinerators.[50]

The Obama Administration has so far stood firm against Congressional criticism of the MACT standards. As noted above, the Administration threatened to veto the Interior appropriations bill, should it pass, due to the TRAIN act and other policy riders.[51] In a July hearing before the House Oversight and Government Affairs

Subcommittee, EPA Deputy Administrator Bob Perciasepe argued that industry has overstated the cost of implementing the Utility MACT standard and other air rules and that issuing multiple rules affecting electric utilities in the same time frame “helps provide utilities with the certainty they need” to make long-term investments in power plant improvements, and would put people to work modernizing power plants.[52]

There is, however, broad opposition to the new rules in the private sector, and House Republicans have begun to tie them to the nation’s economic problems, suggesting that these new rules will cost jobs the nation can ill afford to lose. EPA and the supporters of the new rules argue that the health benefits of the new rules are worth more than their implementation costs. The Obama administration’s political supporters also discount the political implications of these rules, arguing that improving air quality is always politically popular.[53]

III. Conclusion

The steady drumbeat of electoral politics is altering EPA’s regulatory agenda in ways not seen in many years, if ever. The Obama Administration’s decision not to proceed with tightening the ozone standard demonstrates that – at least for now – the country’s immediate economic worries trump longer term environmental concerns. Environmentalists are closely watching to see how the Administration will react as other EPA actions come under attack this fall. Some Republicans and Tea Party activists, meanwhile, have already shifted their goals from repeal of specific regulatory actions to modification or repeal of certain environmental statutes. One thing that is clear is that the actions of EPA and other environmental and resource agencies will be grist for the political mill over the coming months, as both parties prepare for the 2012 elections.

For more information about the ozone NAAQS, Boiler MACT, Utility MACT, or other air quality issues, please contact [Svend Brandt-Erichsen](#) or any other member of Marten Law’s [Air Quality](#) practice.

[1] Washington Post, *Obama pulls back proposed smog standards, in victory for business* (September 2, 2011).

[2] Republican Majority Leader Eric Cantor memo to House Republicans, *Upcoming Jobs Agenda* (August 29, 2011).

[3] While ozone is a health hazard in the lower atmosphere, it also occurs naturally in the stratosphere, 10 to 30 miles above the earth’s surface, where it forms a beneficial barrier to harmful components of the sun’s rays.

[4] 42 U.S.C. §7409(b).

[5] 42 U.S.C. § 7409. NAAQS appear in 40 C.F.R. Part 50. In addition to ozone, EPA has developed NAAQS for sulfur oxides, nitrogen dioxide, particulate matter, carbon monoxide and lead. See 40 C.F.R. Part 50. Nitrogen oxides and VOCs are regulated as precursors to ozone.

[6] In 1997, EPA set the ozone NAAQS at 0.08 parts per million (“ppm”), which was equivalent to 0.084 using standard rounding conventions. *See* 40 C.F.R. § 50.10 and Part 50 App. I; 62 Fed. Reg. 38,856 (July 18, 1997).

[7] 40 C.F.R. § 50.15; 73 Fed. Reg. 16,436 (March 27, 2008). The ozone standard is applied as an 8-hour average concentration. To reduce the impact of unusual weather events, an area’s compliance with the ozone NAAQS is determined using the fourth highest 8-hour average recorded annually, and that reading is averaged with the fourth-highest readings during the two preceding years.

[8] 42 U.S.C. § 7410.

[9] *See* 42 U.S.C. §§ 7501-7511f.

[10] 42 U.S.C. §7409(d).

[11] *American Lung Assoc. v. Horinko*, D.C. Dist. Ct. No. 03-778.

[12] Consent Decree, D.C. Dist. Ct. No. 03-778 (July 31, 2003).

[13] 73 Fed. Reg. 16,436.

[14] The challenges to the standard were consolidated in the D.C. Circuit as *State of Mississippi, et al. v. U.S. EPA*, Case No. 08-1200.

[15] Letters for Dr. Rogene Henderson, Chair, Clean Air Scientific Advisory Committee, to EPA Administrator, October 24, 2006 and March 26, 2007.

[16] 75 Fed. Reg. 2938 (January 19, 2010).

[17] *E.g.*, American Lung Association, *EPA Proposes a Stronger Ozone Standard* (January 2010).

[18] Business Roundtable, *EPA Ozone Standard Map* (undated).

[19] MAPI Manufacturers Alliance, *Economic Implications of EPA’s Proposed Ozone Standard* (September 2010).

[20] Declaration of Regina McCarthy, Asst. Administrator for Air and Radiation, *State of Mississippi v. U.S. EPA*, D.C. Circ. No. 08-1200 (December 8, 2010).

[21] *State of Mississippi v. U.S.E.P.A.*, Doc. No. 1322086 (August 8, 2011).

[22] *State of Mississippi v. U.S.E.P.A.*, Doc. No. 1323634 (August 10, 2011).

[23] Politico, *Industry: EPA hurts Obama in 2012* (July 15, 2011).

[24] Letter from Business Roundtable, U.S. Chamber of Commerce, American Petroleum Institute, National Federation of Independent Business, American Chemistry Council, and National Association of Manufacturers to President Obama (August 3, 2011).

[25] BNA Environmental Reporter, *Energy Committee Votes to Delay MACT, Interstate Pollution Rule, Approves TRAIN Act*, 42 ER 1599 (July 15, 2011).

[26] H.R. 2584 Sec. 462.

[27] Office of Management and Budget, Statement of Administration Policy (July 21, 2011).

[28] Letter from Senator Sessions and 33 others to Administrator Lisa Jackson (July 25, 2011).

[29] Washington Post, *Removing the obstacles to economic growth* by Eric Cantor (August 21, 2011).

[30] Statement by the President on the National Ambient Air Quality Standards (September 2, 2011).

[31] *Id.*

[32] Majority Leader Cantor memo to House Republicans.

[33] 42 U.S.C. § 7412.

[34] *See* 40 CFR Part 63.

[35] Fed. Reg. 55,218 (Sept. 13, 2004).

[36] *NRDC v. EPA*, 489 F.3d 1250, 1257-61 (D.C. Cir. 2007).

[37] 75 Fed. Reg. 31,895 (June 4, 2010).

[38] 76 Fed. Reg. 15,608 (March 21, 2011).

[39] 76 Fed. Reg. 15,249 (March 21, 2011).

[40] 76 Fed. Reg. 28,662 (May 18, 2011).

[41] 65 Fed. Reg. 79,826 (Dec. 20, 2000).

[42] 70 Fed. Reg. 15,994 (March 29, 2005).

[43] 70 Fed. Reg. 28,606 (May 18, 2005).

[44] *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

[45] 76 Fed. Reg. 24,976 (May 3, 2011).

[46] EPA extended the original 60 day comment period. 76 Fed. Reg. 38,590 (July 1, 2011).

[47] H.R. 2401.

[48] H.R. 2584, Sec. 462.

[49] E&E Daily, *Green groups say Senate MACT bill worse than House version* (July 21, 2011).

[50] *Id.*

[51] *See* note 28.

[52] BNA Environmental Reporter, *Stronger Air Pollution Rules Provide Certainty For Power Plants, Create New Jobs*, EPA Says 42 ER 1686 (July 29, 2011).

[53] Politico, *Browner: GOP-EPA fight reply of 95* (July 27, 2011).

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Public Service Company of New Hampshire
Least Cost Integrated Resource Plan

Docket No. DE 10-261

Staff Responses to First Set of PSNH Data Requests to Staff

Date Received: August 15, 2011

Date of Response: August 29, 2011

Request: PSNH 1-40

Witness: George McCluskey

REQUEST:

Referencing page 27 lines 4-11:

- a. Is the testimony referring to regulations promulgated by the EPA under Section 316(b) of the Clean Water Act?
- b. What is the status with respect to these regulations, that is, are they proposed or final rules?
- c. When will these rules become final or when did they become final?
- d. Provide the specific citations for portions of these EPA rules that mandate the installation of cooling towers at Newington.

RESPONSE:

- a. Yes.
- b. The rule is currently in its proposed form.
- c. Staff understands that the final rule is due by November 16, 2011.
- d. Staff does not claim that the proposed rule mandates installation of cooling towers at Newington.

Filed on: 07/07/2011
Public Service Company of New Hampshire
Docket No. DE 10-261

Technical Session TS-02
Dated: 06/22/2011
Q-TECH-014
Page 1 of 3

Witness: William H. Smagula
Request from: New Hampshire Public Utilities Commission Staff

Question:

Provide a sole source justification for PSNH's use of Emera as the single supplier of natural gas for Newington Station. Define why PSNH works solely with Emera for natural gas fuel supply, and what the benefits are to this relationship on behalf of customers.

Response:

Attached is the sole source justification that has been approved by PSNH's Vice President of Generation for the use of Emera as the supplier of natural gas for Newington Station. The document states the reasons why PSNH works solely with Emera for natural gas fuel supply.

Emera stands apart from other natural gas suppliers in that their responsiveness after -hours, late night and/or weekends, has allowed Newington Station to be much more flexible in responding to dispatch orders from ISO-New England late in the day or on weekends. PSNH's experience with other gas suppliers is that they have not been responsive to Newington Station's gas supply needs. Emera's dependability, flexibility and responsiveness to PSNH's intermittent and unpredictable needs benefits customers by allowing Newington to operate economically on gas when the opportunity exists, providing a lower cost power supply option for customers.

SOLE SOURCE JUSTIFICATION FORM

(For transactions valued at \$50,000 or more.)

PS6878 REV. 2-10

| | |
|--|--|
| DEPARTMENT <i>PSNH Fuel Purchasing & Supply</i> | AMOUNT \$ <i>< 10 million/year</i> |
| REQUESTOR <i>J. TenBroek</i> | BUYER <i>J. TenBroek</i> |
| VENDOR <i>Emera Energy</i> | DATE <i>9/30/10</i> |

I. Classification - If one or more of the criteria listed below (A through F) applies, check the appropriate box(es) and complete Sections II and V. In addition, if E and/or F are applicable, Sections III (Emergency Requirements) and/or IV (Exclusive Capability) must be completed.

- A. Proprietary.** Item under patent, copyright, or proprietary design, direct from manufacturer, and comparable alternatives are unavailable. (You must also complete Sections II and V).
- B. Non-Responsive Bids.** Bids were solicited, but no responsive bid has been received from requested bidders. A copy of all bids and a list of other solicited vendors must be attached. (You must also complete Section II).
- C. Replacement Parts.** The procurement is for replacement parts or components in support of equipment specially designed by the manufacturer, and available only through this source. (You must also complete Sections II and V).
- D. Continuation.** Continuation of work by the same vendor. Additional work, items, or service required, but not known to be needed when the original order was placed to complete an existing project. (You must also complete Sections II and V).
- E. Emergency Requirement.** Requirements must be met immediately. An explanation of urgency (i.e., circumstances beyond the reasonable control of Utility, unscheduled outage), including a description of why procurement is critical and why only the proposed vendor can meet it. A lack of advance planning for known events is not acceptable. (You must also complete Sections II, III, IV and V).
- F. Technical Services and/or Equipment and Exclusive Capability.** The procurement is for technical service in connection with the assembly, installation, or servicing of equipment of a highly technical or specialized nature and this is the only qualified source. After reasonable inquiry, only one supplier qualified or no other potential suppliers are known. (You must also complete Sections II, III, IV and V).
- G. Unique Skills and Exclusive Capability.** The procurement is for specialized service and supplier has unique skills and capability. After reasonable inquiry, only one supplier qualified or no other potential suppliers are known. (You must also complete Sections IV and V).

II. Surplus - Has surplus equipment been considered as an alternative to this purchase? Yes No

Explanation: *N/A*

III. Emergency Requirements - Additional Documentation Summary (Check all that apply)

- Immediate compliance with regulatory requirements.
- Storm or weather related conditions requiring immediate action.
- Needed immediately for unscheduled outage.
- Safety or hazardous conditions requiring immediate action.
- Replacement parts or equipment necessary for continuing construction or operations.
- Other (Please explain below):

N/A

IV. Exclusive Capability - Additional Documentation Summary (Check Yes/No if description applies)

Reason: There is only one supplier who is technically and commercially capable of providing the goods or services that are being procured and has satisfied one or more of the following criteria:

- | | YES | NO |
|---|-------------------------------------|--------------------------|
| A. Specially trained personnel: | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| B. Has demonstrated specialized experience and has a proven record of performance. | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| C. Unique or vital facilities and test equipment. | <input type="checkbox"/> | <input type="checkbox"/> |
| D. Unique knowledge of equipment or components. | <input type="checkbox"/> | <input type="checkbox"/> |
| E. Responsibility for integrated system performance will be voided if other vendors are introduced. | <input type="checkbox"/> | <input type="checkbox"/> |
| F. Quality of equipment from all other known vendor sources has been demonstrated to be inferior or unacceptable. | <input type="checkbox"/> | <input type="checkbox"/> |
| G. Ability to perform the service or deliver the equipment in accordance with Utility's necessary time schedule. | <input type="checkbox"/> | <input type="checkbox"/> |

H. Other (Please explain below):

One of three major suppliers on the delivering pipeline (PMGTs). The other two (Repsol & Shell) have not shown the resources necessary to support PSNH's requirements in terms of 24/7 support (weekend & intra-day terminations) & required gas volumes.

V. Narrative Justification (This section must be completed) - Be very precise when filling in this section:

Name all potential suppliers and explain steps taken to identify them. Provide an explanation of how you concluded that the item/service manufacturer is the only one capable of meeting your needs. (Consider the availability of substitute equipment or services and/or what makes this vendor uniquely qualified, risks that will occur should the requested supplier not be used such as equipment damage, service loss, environmental concerns).

Emera has been highly dependable & flexible, both important attributes required to support Merrimack Station's widely ranging natural gas needs that are intermittent & mostly unpredictable.

- Repsol, the owner/operator of a large LNG facility in St. Johnsbury, NB is dedicated to supplying only a few customers in the Boston area, as most of the LNG facilities supplying the plant have sailed to Europe where the gas market is more profitable.

- Shell has shown little interest in supplying gas to PSNH. When asked to bid they have not bid.

Is the cost reasonable, fair and customary? (Factors to consider include comparison of previously proposed prices for the same or similar items, comparison with competitive published price lists, market indices, comparison of proposed prices with independent market research, analysis of pricing information provided by vendor)

Quoted prices are checked against the daily posted prices for nearby interstate gas pipeline supply points; specifically in this case against Tennessee zone of price postings by Platts Gas Daily.

Approvals: (must follow APS #5)

| | | | |
|--|---|----------|----------|
| REQUESTOR SIGNATURE | <i>[Signature]</i> | DATE | 9/20/10 |
| REQUESTOR'S MANAGER / SUPERVISOR SIGNATURE | Jody Ferbrook Manager, Fuel | DATE | |
| BUSINESS UNIT DIRECTOR / VP SIGNATURE | <i>[Signature]</i> | DATE | 10/11/10 |
| | JOHN M. MACDONALD VP GENERATION-PSNH | | |
| SOURCING CODE SC # | PO # | 02250431 | |
| REVIEWERS | N/A | | |
| RECOMMENDATIONS FROM SOURCING | | | |