

with 40 CFR Part 51, Appendix W “Guideline on Air Quality Models,” as incorporated into the Tennessee SIP. These standards demonstrate that Tennessee has the authority to provide relevant data for the purpose of predicting the effect on ambient air quality of the 8-hour ozone NAAQS. Additionally, Tennessee supports a regional effort to coordinate the development of emissions inventories and conduct regional modeling for several NAAQS, including the 1997 8-hour ozone NAAQS, for the Southeastern states. Taken as a whole, Tennessee’s air quality regulations and practices demonstrate that TDEC has the authority to provide relevant data for the purpose of predicting the effect on ambient air quality of the 8-hour ozone NAAQS. EPA has made the preliminary determination that Tennessee’s SIP and practices adequately demonstrate the State’s ability to provide for air quality and modeling, along with analysis of the associated data, related to the 1997 8-hour ozone NAAQS when necessary.

9. 110(a)(2)(L) *Permitting fees*: As discussed above, Tennessee’s SIP provides for the review of construction permits. Permitting fees in Tennessee are collected through the State’s federally-approved title V fees program and consistent with Chapter 1200–03–26–.02, *Permit-Related Fees*, of the Tennessee Code. EPA has made the preliminary determination that Tennessee’s SIP and practices adequately provide for permitting fees related to the 1997 8-hour ozone NAAQS when necessary.

10. 110(a)(2)(M) *Consultation/participation by affected local entities*: Chapter 1200–3–9–.01(4)(k), *Public Participation*, of the Tennessee SIP requires that TDEC notify the public of an application, preliminary determination, the activity or activities involved in the permit action, any emissions change associated with any permit modification, and the opportunity for comment prior to making a final permitting decision. By way of example, TDEC has recently worked closely with local political subdivisions during the development of its Transportation Conformity SIP, Regional Haze Implementation Plan, and Early Action Compacts. EPA has made the preliminary determination that Tennessee’s SIP and practices adequately demonstrate consultation with affected local entities related to the 1997 8-hour ozone NAAQS when necessary.

## V. Proposed Action

As described above, with the exception of sub-element

110(a)(2)(E)(ii), EPA is proposing to determine that Tennessee’s infrastructure submission, provided to EPA on December 14, 2007, addressed the required infrastructure elements for the 1997 8-hour ozone NAAQS. EPA is proposing to approve in part and conditionally approve in part, Tennessee’s SIP submission consistent with section 110(k)(3) of the CAA.

As described above, with the exception of sub-element 110(a)(2)(E)(ii), TDEC has addressed the elements of the CAA 110(a)(1) and (2) SIP requirements pursuant to EPA’s October 2, 2007, guidance to ensure that the 1997 8-hour ozone NAAQS are implemented, enforced, and maintained in Tennessee. With respect to 110(a)(2)(E)(ii) (referencing section 128 of the CAA), EPA is proposing to conditionally approve Tennessee’s infrastructure SIP. On March 28, 2012, Tennessee submitted a letter requesting conditional approval of 110(a)(2)(E)(ii). In this letter, TDEC committed to adopt specific enforceable measures into its SIP and submit these revisions to EPA within one year of EPA’s final rulemaking to address the applicable portions of section 128. EPA is also proposing to approve Tennessee’s infrastructure submission for the 1997 8-hour ozone NAAQS, with the exception of sub-element 110(a)(2)(E)(ii) because its December 14, 2007, submission is consistent with section 110 of the CAA.

## VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. See 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 proposed action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed 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 (Pub. L. 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).

In addition, this proposed 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.

## List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: March 29, 2012.

**A. Stanley Meiburg,**

*Acting Regional Administrator, Region 4.*

[FR Doc. 2012–9073 Filed 4–13–12; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA–R08–OAR–2010–0300; FRL–9659–3]

### Approval and Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards; North Dakota

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve and conditionally approve the State Implementation Plan (SIP) submission from the State of North Dakota to demonstrate that the SIP meets the requirements of section 110(a)(1) and (2) of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for ozone on July 18, 1997. Section 110(a)(1) of the CAA requires that each state, after a new or revised NAAQS is promulgated, review their SIPs to ensure that they meet the requirements of the “infrastructure elements” of section 110(a)(2). The State of North Dakota submitted revisions to their Infrastructure SIP for the 1997 ozone NAAQS, dated April 6, 2009, as well as a certification of their infrastructure SIP for the 1997 ozone NAAQS dated November 23, 2009.

**DATES:** Written comments must be received on or before May 16, 2012.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R08–OAR–2010–0300, by one of the following methods:

- <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- Email: [ayala.kathy@epa.gov](mailto:ayala.kathy@epa.gov).

- Fax: (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).

- Mail: Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.

- Hand Delivery: Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA–R08–OAR–2010–0300. 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](http://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](http://www.regulations.gov) or email. The [www.regulations.gov](http://www.regulations.gov) Web site 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 email comment directly to EPA, without going through [www.regulations.gov](http://www.regulations.gov) your email 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>. For additional instructions on submitting comments, go to section I, General Information, of the **SUPPLEMENTARY INFORMATION** section of this document.

**Docket:** All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Kathy Ayala, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. 303–312–6142, [ayala.kathy@epa.gov](mailto:ayala.kathy@epa.gov).

**SUPPLEMENTARY INFORMATION:****Definitions**

For the purpose of this document, we are giving meaning to certain words or initials as follows:

- (i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

- (ii) The initials *DAQ* mean or refer to Division of Air Quality.

- (iii) The words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.

- (iv) The initials *FIP* mean or refer to a Federal Implementation Plan.

- (v) The initials *GHGs* mean or refer to greenhouse gases.

- (vi) The initials *NAAQS* mean or refer to national ambient air quality standards.

- (vii) The initials *NDAC* mean or refer to North Dakota Administrative Code.

- (viii) The initials *NDCC* mean or refer to North Dakota Century Code.

- (ix) The initials *NO<sub>x</sub>* mean or refer to nitrogen oxides.

- (x) The initials *NSR* mean or refer to new source review.

- (xi) The initials *PM<sub>2.5</sub>* mean or refer to particulate matter with an aerodynamic diameter of less than 2.5 micrometers (fine particulate matter).

- (xii) The initials *ppm* mean or refer to parts per million.

- (xiii) The initials *PSD* mean or refer to Prevention of Significant Deterioration.

- (xiv) The initials *SIP* mean or refer to State Implementation Plan.

- (xv) The initials *SSM* mean or refer to start-up, shutdown, or malfunction.

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**I. General Information**

*What should I consider as I prepare my comments for EPA?*

1. *Submitting Confidential Business Information (CBI).* Do not submit CBI to EPA through <http://www.regulations.gov> or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register**, date, and page number);

Follow directions and organize your comments;

Explain why you agree or disagree;

Suggest alternatives and substitute language for your requested changes;

Describe any assumptions and provide any technical information and/or data that you used;

If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced;

Provide specific examples to illustrate your concerns, and suggest alternatives;

Explain your views as clearly as possible, avoiding the use of profanity or personal threats; and,

Make sure to submit your comments by the comment period deadline identified.

## II. Background

On July 18, 1997, EPA promulgated a new NAAQS for ozone based on 8-hour average concentrations. The 8-hour averaging period replaced the previous 1-hour averaging period, and the level of the NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38856). By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised standard. Section 110(a)(2) provides basic requirements for SIPs, including emissions inventories, monitoring, and modeling, to assure attainment and maintenance of the standards. These requirements are set out in several “infrastructure elements,” listed in section 110(a)(2).

Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, and the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submission may also vary depending upon what provisions the state’s existing SIP already contains. In the case of the 1997 ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous NAAQS.

In a guidance issued on October 2, 2007, EPA noted that, to the extent an existing SIP already meets the section 110(a)(2) requirements, states need only certify that fact via a letter to EPA.<sup>1</sup>

<sup>1</sup> Memorandum from William T. Harnett, Director, Air Quality Policy Division, “Guidance on SIP Elements Required Under Sections 110(a)(1)

On March 27, 2008, EPA published a final rule entitled, “Completeness Findings for Section 110(a) State Implementation Plans for the 8-hour Ozone NAAQS” (73 FR 16205). In the rule, EPA made a finding for each state that it had submitted or failed to submit a complete SIP that provided the basic program elements of section 110(a)(2) necessary to implement the 1997 8-hour ozone NAAQS. In this rule, EPA found that North Dakota failed to submit the relevant SIP. The findings of failure to submit established a 24-month deadline for EPA to promulgate a Federal Implementation Plan (FIP) to address the outstanding SIP elements unless, prior to that time, North Dakota submitted, and EPA approved, the required SIP. However, the finding of failure to submit did not impose sanctions, set deadlines for imposing sanctions, or set deadlines for imposing sanctions as described in section 179 of the CAA, because these findings do not pertain to the elements contained in the Title I part D plan for nonattainment areas as required under section 110(a)(2)(I). Additionally, the finding of failure to submit for the infrastructure submittals are not SIP calls under section 110(k)(5).

Section 110(a)(1) provides the procedural and timing requirements for SIP submissions after a new or revised NAAQS is promulgated. Section 110(a)(2) lists specific elements the SIP must contain or satisfy. These infrastructure elements include requirements such as modeling, monitoring, and emissions inventories, which are designed to assure attainment and maintenance of the NAAQS. The elements that are the subject of this action are listed below.

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.
- 110(a)(2)(D)(ii): Interstate and international pollution.
- 110(a)(2)(E): Adequate resources and authority.
- 110(a)(2)(F): Stationary source monitoring and reporting.
- 110(a)(2)(G): Emergency powers.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(J): Consultation with government officials; public notification; and prevention of significant deterioration (PSD) and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.

and (2) for the 1997 8-hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards” (Oct. 2, 2007).

- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

A detailed discussion of each of these elements is contained in the next section.

Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) and are therefore not addressed in this action. These elements relate to part D of Title I of the CAA, and submissions to satisfy them are not due within three years after promulgation of a new or revised NAAQS, but rather are due at the same time nonattainment area plan requirements are due under section 172. The two elements are: (i) Section 110(a)(2)(C) to the extent it refers to permit programs (known as “nonattainment new source review (NSR)”) required under part D, and (ii) section 110(a)(2)(I) pertaining to the nonattainment planning requirements of part D. As a result, this action does not address infrastructure elements related to the nonattainment NSR portion of section 110(a)(2)(C) or related to 110(a)(2)(I).

This action also does not address the “interstate transport” requirements of element 110(a)(2)(D)(i), or the visibility protection requirements of element 110(a)(2)(J). EPA approved portions of the state’s 110(a)(2)(D)(i) interstate transport SIP for the 1997 ozone NAAQS in separate prior actions (75 FR 31290; 75 FR 71023).

## III. Scope of Infrastructure SIPs

EPA is currently acting upon SIPs that address the infrastructure requirements of CAA section 110(a)(1) and (2) for ozone and fine particulate matter (PM<sub>2.5</sub>) NAAQS for various states across the country. Commenters on EPA’s recent proposals for some states raised concerns about EPA statements that it was not addressing certain substantive issues in the context of acting on the infrastructure SIP submissions.<sup>2</sup> The commenters specifically raised concerns involving provisions in existing SIPs and with EPA’s statements that it would address two issues separately and not as part of actions on the infrastructure SIP submissions: (i) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction (SSM) at sources, that may

<sup>2</sup> See, Comments of Midwest Environmental Defense Center, dated May 31, 2011. Docket # EPA–R05–OAR–2007–1179 (adverse comments on proposals for three states in Region 5). EPA notes that these public comments on another proposal are not relevant to this rulemaking and do not have to be directly addressed in this rulemaking. EPA will respond to these comments in the appropriate rulemaking action to which they apply.

be contrary to the CAA and EPA's policies addressing such excess emissions; and (ii) existing provisions related to "director's variance" or "director's discretion" that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA ("director's discretion"). EPA notes that there are two other substantive issues for which EPA likewise stated that it would address the issues separately: (i) Existing provisions for minor source NSR programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs ("minor source NSR"); and (ii) existing provisions for PSD programs that may be inconsistent with current requirements of EPA's "Final NSR Improvement Rule," 67 FR 80,186 (December 31, 2002), as amended by 72 FR 32,526 (June 13, 2007) ("NSR Reform"). In light of the comments, EPA now believes that its statements in various proposed actions on infrastructure SIPs with respect to these four individual issues should be explained in greater depth with respect to these issues.

EPA intended the statements in the proposals concerning these four issues merely to be informational, and to provide general notice of the potential existence of provisions within the existing SIPs of some states that might require future corrective action. EPA did not want states, regulated entities, or members of the public to be under the misconception that the Agency's approval of the infrastructure SIP submission of a given state should be interpreted as a reapproval of certain types of provisions that might exist buried in the larger existing SIP for such state. Thus, for example, EPA explicitly noted that the Agency believes that some states may have existing SIP approved SSM provisions that are contrary to the CAA and EPA policy, but that "in this rulemaking, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during SSM of operations at facilities." EPA further explained, for informational purposes, that "EPA plans to address such state regulations in the future." EPA made similar statements, for similar reasons, with respect to the director's discretion, minor source NSR, and NSR Reform issues. EPA's objective was to make clear that approval of an infrastructure SIP for these ozone and PM<sub>2.5</sub> NAAQS should not be construed as explicit or implicit reapproval of any existing

provisions that relate to these four substantive issues.

Unfortunately, the commenters and others evidently interpreted these statements to mean that EPA considered action upon the SSM provisions and the other three substantive issues to be integral parts of acting on an infrastructure SIP submission, and therefore that EPA was merely postponing taking final action on the issue in the context of the infrastructure SIPs. This was not EPA's intention. To the contrary, EPA only meant to convey its awareness of the potential for certain types of deficiencies in existing SIPs, and to prevent any misunderstanding that it was reapproving any such existing provisions. EPA's intention was to convey its position that the statute does not require that infrastructure SIPs address these specific substantive issues in existing SIPs and that these issues may be dealt with separately, outside the context of acting on the infrastructure SIP submission of a state. To be clear, EPA did not mean to imply that it was not taking a full final agency action on the infrastructure SIP submission with respect to any substantive issue that EPA considers to be a required part of acting on such submissions under section 110(k) or under section 110(c). Given the confusion evidently resulting from EPA's statements, however, we want to explain more fully the Agency's reasons for concluding that these four potential substantive issues in existing SIPs may be addressed separately.

The requirement for the SIP submissions at issue arises out of CAA section 110(a)(1). That provision requires that states must make a SIP submission "within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)" and that these SIPs are to provide for the "implementation, maintenance, and enforcement" of such NAAQS. Section 110(a)(2) includes a list of specific elements that "[e]ach such plan" submission must meet. EPA has historically referred to these particular submissions that states must make after the promulgation of a new or revised NAAQS as "infrastructure SIPs." This specific term does not appear in the statute, but EPA uses the term to distinguish this particular type of SIP submission designed to address basic structural requirements of a SIP from other types of SIP submissions designed to address other different requirements, such as "nonattainment SIP" submissions required to address the nonattainment planning requirements of

part D, "regional haze SIP" submissions required to address the visibility protection requirements of CAA section 169A, NSR permitting program submissions required to address the requirements of part D, and a host of other specific types of SIP submissions that address other specific matters.

Although section 110(a)(1) addresses the timing and general requirements for these infrastructure SIPs, and section 110(a)(2) provides more details concerning the required contents of these infrastructure SIPs, EPA believes that many of the specific statutory provisions are facially ambiguous. In particular, the list of required elements provided in section 110(a)(2) contains a wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive provisions, and some of which pertain to requirements for both authority and substantive provisions.<sup>3</sup> Some of the elements of section 110(a)(2) are relatively straightforward, but others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS.<sup>4</sup>

Notwithstanding that section 110(a)(2) states that "each" SIP submission must meet the list of requirements therein, EPA has long noted that this literal reading of the statute is internally inconsistent, insofar as section 110(a)(2)(I) pertains to nonattainment SIP requirements that could not be met on the schedule provided for these SIP submissions in section 110(a)(1).<sup>5</sup> This illustrates that EPA must determine which provisions of section 110(a)(2) may be applicable for a given

<sup>3</sup> For example, section 110(a)(2)(E) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a substantive program to address certain sources as required by part C of the CAA; section 110(a)(2)(G) provides that states must have both legal authority to address emergencies and substantive contingency plans in the event of such an emergency.

<sup>4</sup> For example, section 110(a)(2)(D)(i) requires EPA to be sure that each SIP contains adequate provisions to prevent significant contribution to nonattainment of the NAAQS in other states. This provision contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution. See, e.g., "Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call; Final Rule," 70 FR 25162 (May 12, 2005)(defining, among other things, the phrase "contribute significantly to nonattainment").

<sup>5</sup> See, e.g., *Id.*, 70 FR 25162, at 63–65 (May 12, 2005)(explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

infrastructure SIP submission. Similarly, EPA has previously decided that it could take action on different parts of the larger, general “infrastructure SIP” for a given NAAQS without concurrent action on all subsections, such as section 110(a)(2)(D)(i), because the Agency bifurcated the action on these latter “interstate transport” provisions within section 110(a)(2) and worked with states to address each of the four prongs of section 110(a)(2)(D)(i) with substantive administrative actions proceeding on different tracks with different schedules.<sup>6</sup> This illustrates that EPA may conclude that subdividing the applicable requirements of section 110(a)(2) into separate SIP actions may sometimes be appropriate for a given NAAQS where a specific substantive action is necessitated, beyond a mere submission addressing basic structural aspects of the SIP. Finally, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS and the attendant infrastructure SIP submission for that NAAQS. For example, the monitoring requirements that might be necessary for purposes of section 110(a)(2)(B) for one NAAQS could be very different than what might be necessary for a different pollutant. Thus, the content of an infrastructure SIP submission to meet this element from a state might be very different for an entirely new NAAQS, versus a minor revision to an existing NAAQS.<sup>7</sup>

Similarly, EPA notes that other types of SIP submissions required under the statute also must meet the requirements of section 110(a)(2), and this also demonstrates the need to identify the applicable elements for other SIP submissions. For example, nonattainment SIPs required by part D likewise have to meet the relevant subsections of section 110(a)(2) such as section 110(a)(2)(A) or (E). By contrast, it is clear that nonattainment SIPs would not need to meet the portion of section 110(a)(2)(C) that pertains to part C, *i.e.*, the PSD requirement applicable

in attainment areas. Nonattainment SIPs required by part D also would not need to address the requirements of section 110(a)(2)(G) with respect to emergency episodes, as such requirements would not be limited to nonattainment areas. As this example illustrates, each type of SIP submission may implicate some subsections of section 110(a)(2) and not others.

Given the potential for ambiguity of the statutory language of section 110(a)(1) and (2), EPA believes that it is appropriate for EPA to interpret that language in the context of acting on the infrastructure SIPs for a given NAAQS. Because of the inherent ambiguity of the list of requirements in section 110(a)(2), EPA has adopted an approach in which it reviews infrastructure SIPs against this list of elements “as applicable.” In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the purpose of the submission or the NAAQS in question, would meet each of the requirements, or meet each of them in the same way. EPA elected to use guidance to make recommendations for infrastructure SIPs for these NAAQS.

On October 2, 2007, EPA issued guidance making recommendations for the infrastructure SIP submissions for both the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS.<sup>8</sup> Within this guidance document, EPA described the duty of states to make these submissions to meet what the Agency characterized as the “infrastructure” elements for SIPs, which it further described as the “basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards.”<sup>9</sup> As further identification of these basic structural SIP requirements, “attachment A” to the guidance document included a short description of the various elements of section 110(a)(2) and additional information about the types of issues that EPA considered germane in the context of such infrastructure SIPs. EPA emphasized that the description of the basic requirements listed on attachment

A was not intended “to constitute an interpretation of” the requirements, and was merely a “brief description of the required elements.”<sup>10</sup> EPA also stated its belief that with one exception, these requirements were “relatively self explanatory, and past experience with SIPs for other NAAQS should enable states to meet these requirements with assistance from EPA Regions.”<sup>11</sup> For the one exception to that general assumption, however, *i.e.*, how states should proceed with respect to the requirements of section 110(a)(2)(G) for the 1997 PM<sub>2.5</sub> NAAQS, EPA gave much more specific recommendations. But for other infrastructure SIP submittals, and for certain elements of the submittals for the 1997 PM<sub>2.5</sub> NAAQS, EPA assumed that each state would work with its corresponding EPA regional office to refine the scope of a state’s submittal based on an assessment of how the requirements of section 110(a)(2) should reasonably apply to the basic structure of the SIP for the NAAQS in question.

Significantly, the 2007 Guidance did not explicitly refer to the SSM, director’s discretion, minor source NSR, or NSR Reform issues as among specific substantive issues EPA expected states to address in the context of the infrastructure SIPs, nor did EPA give any more specific recommendations with respect to how states might address such issues even if they elected to do so. The SSM and director’s discretion issues implicate section 110(a)(2)(A), and the minor source NSR and NSR Reform issues implicate section 110(a)(2)(C). In the 2007 Guidance, however, EPA did not indicate to states that it intended to interpret these provisions as requiring a substantive submission to address these specific issues in the context of the infrastructure SIPs for these NAAQS. Instead, EPA’s 2007 Guidance merely indicated its belief that the states should make submissions in which they established that they have the basic SIP structure necessary to implement, maintain, and enforce the NAAQS. EPA believes that states can establish that they have the basic SIP structure, notwithstanding that there may be potential deficiencies within the existing SIP. Thus, EPA’s proposals mentioned these issues not because the

<sup>6</sup> EPA issued separate guidance to states with respect to SIP submissions to meet section 110(a)(2)(D)(i) for the 1997 ozone and 1997 PM<sub>2.5</sub> NAAQS. See, “Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards,” from William T. Harnett, Director Air Quality Policy Division OAQPS, to Regional Air Division Director, Regions I–X, dated August 15, 2006.

<sup>7</sup> For example, implementation of the 1997 PM<sub>2.5</sub> NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

<sup>8</sup> See, “Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards,” from William T. Harnett, Director Air Quality Policy Division, to Air Division Directors, Regions I–X, dated October 2, 2007 (the “2007 Guidance”). EPA issued comparable guidance for the 2006 PM<sub>2.5</sub> NAAQS entitled “Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle (PM<sub>2.5</sub>) National Ambient Air Quality Standards (NAAQS),” from William T. Harnett, Director Air Quality Policy Division, to Regional Air Division Directors, Regions I–X, dated September 25, 2009 (the “2009 Guidance”).

<sup>9</sup> *Id.*, at page 2.

<sup>10</sup> *Id.*, at attachment A, page 1.

<sup>11</sup> *Id.*, at page 4. In retrospect, the concerns raised by commenters with respect to EPA’s approach to some substantive issues indicates that the statute is not so “self explanatory,” and indeed is sufficiently ambiguous that EPA needs to interpret it in order to explain why these substantive issues do not need to be addressed in the context of infrastructure SIPs and may be addressed at other times and by other means.

Agency considers them issues that must be addressed in the context of an infrastructure SIP as required by section 110(a)(1) and (2), but rather because EPA wanted to be clear that it considers these potential existing SIP problems as separate from the pending infrastructure SIP actions.

EPA believes that this approach to the infrastructure SIP requirement is reasonable, because it would not be feasible to read section 110(a)(1) and (2) to require a top to bottom, stem to stern, review of each and every provision of an existing SIP merely for purposes of assuring that the state in question has the basic structural elements for a functioning SIP for a new or revised NAAQS. Because SIPs have grown by accretion over the decades as statutory and regulatory requirements under the CAA have evolved, they may include some outmoded provisions and historical artifacts that, while not fully up to date, nevertheless may not pose a significant problem for the purposes of “implementation, maintenance, and enforcement” of a new or revised NAAQS when EPA considers the overall effectiveness of the SIP. To the contrary, EPA believes that a better approach is for EPA to determine which specific SIP elements from section 110(a)(2) are applicable to an infrastructure SIP for a given NAAQS, and to focus attention on those elements that are most likely to need a specific SIP revision in light of the new or revised NAAQS. Thus, for example, EPA’s 2007 Guidance specifically directed states to focus on the requirements of section 110(a)(2)(G) for the 1997 PM<sub>2.5</sub> NAAQS because of the absence of underlying EPA regulations for emergency episodes for this NAAQS and an anticipated absence of relevant provisions in existing SIPs.

Finally, EPA believes that its approach is a reasonable reading of section 110(a)(1) and (2) because the statute provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow the Agency to take appropriate tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a “SIP call” whenever the Agency determines that a SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or otherwise to comply with the CAA.<sup>12</sup> Section 110(k)(6) authorizes EPA to

correct errors in past actions, such as past approvals of SIP submissions.<sup>13</sup> Significantly, EPA’s determination that an action on the infrastructure SIP is not the appropriate time and place to address all potential existing SIP problems does not preclude the Agency’s subsequent reliance on provisions in section 110(a)(2) as part of the basis for action at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director’s discretion provisions in the course of acting on the infrastructure SIP, EPA believes that section 110(a)(2)(A) may be among the statutory bases that the Agency cites in the course of addressing the issue in a subsequent action.<sup>14</sup>

#### IV. How did the State of North Dakota address the infrastructure elements of section 110(a)(1) and (2)?

1. *Emission limits and other control measures:* Section 110(a)(2)(A) requires SIPs to include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this Act.

a. *North Dakota’s response to this requirement:* The State listed the following provisions to meet this element: North Dakota Century Code (NDCC) 23–25–03.5–.8; NDCC 23–25–03.12; NDCC 23–25–04.2; North Dakota Administrative Code (NDAC) 33–15–07, 17, 20 (Control measures for VOC); NDAC 33–15–23 (Fees).

b. *EPA analysis:* North Dakota’s SIP meets the requirements of CAA section 110(a)(2)(A) for the 1997 ozone NAAQS, subject to the following clarifications.

<sup>13</sup> EPA has utilized this authority to correct errors in past actions on SIP submissions related to PSD programs. See, “Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting Sources in State Implementation Plans; Final Rule,” 75 FR 82,536 (Dec. 30, 2010). EPA has previously used its authority under CAA 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. See, e.g., 61 FR 38,664 (July 25, 1996) and 62 FR 34,641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67,062 (November 16, 2004) (corrections to California SIP); and 74 FR 57,051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

<sup>14</sup> EPA has disapproved a SIP submission from Colorado on the grounds that it would have included a director’s discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, e.g., 75 FR 42,342 at 42,344 (July 21, 2010) (proposed disapproval of director’s discretion provisions); 76 FR 4540 (Jan. 26, 2011) (final disapproval of such provisions).

First, this infrastructure element does not require the submittal of regulations or emission limitations developed specifically for attaining the 1997 ozone NAAQS, and North Dakota has no areas designated as nonattainment for the 1997 ozone NAAQS. Nonetheless, the North Dakota SIP contains provisions for control of volatile organic compounds, an ozone precursor (NDAC 33–15–07). North Dakota also regulates emissions of ozone and its precursors through its SIP-approved major and minor source permitting programs (64 FR 32433, June 17, 1999; 71 FR 3764, January 24, 2006). This suffices, in the case of North Dakota, to meet the requirements of section 110(a)(2)(A) for the 1997 ozone NAAQS.

2. *Ambient air quality monitoring/data system:* Section 110(a)(2)(B) requires SIPs to provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator.

a. *North Dakota’s response to this requirement:* The State listed the following provisions to meet this element: NDCC 23–25–03.2; NDCC 23–25–05; NDCC 23–15–14–02.9a; SIP Sections 6.7 & 6.8.

b. *EPA analysis:* North Dakota’s air monitoring programs and data systems meet the requirements of CAA section 110(a)(2)(B) for the 1997 ozone NAAQS. The North Dakota Division of Air Quality’s (DAQ) 2011 Ambient Air Annual Monitoring Network Plan was approved by EPA Region 8 on January 12, 2011. In this action, EPA also proposes approval of North Dakota’s revised SIP chapter 6.8, “Annual Network Review,” and revised SIP chapter 6.11.3, “Air Quality Surveillance: Ozone,” submitted April 6, 2009.

3. *Program for enforcement of control measures:* Section 110(a)(2)(C) requires SIPs to include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that NAAQS are achieved, including a permit program as required in parts C and D.

a. *North Dakota’s response to this requirement:* The State listed the following provisions to meet this element: Enforcement: NDCC 23–25–10; NDCC 23–25–05; NDCC 33–15–01–17; Permits: NDCC 23–25–03.6; NDCC 33–15–14; NDCC 33–15–15; SIP Chapters 7 and 8.

<sup>12</sup> EPA has issued a SIP call to rectify a specific SIP deficiency related to the SSM issue. See, “Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,” 74 FR 21,639 (April 18, 2011).

b. *EPA analysis:* As explained above, in this action EPA is not evaluating non-attainment related provisions, such as the nonattainment NSR program required by part D of the Act. In addition, North Dakota has no nonattainment areas for the 1997 ozone NAAQS, and is therefore, not required at this point to have a corresponding nonattainment NSR program. In this action, EPA is evaluating the State's PSD program as required by part C of the Act, and the State's minor NSR program as required by 110(a)(2)(C).

#### North Dakota's PSD Program

North Dakota's SIP-approved PSD program incorporates by reference (with certain exceptions) the federal PSD program at 52.21 as of August 1, 2007. As described in our notice of approval of the most recent revision of the program (75 FR 31290, June 3, 2010), North Dakota's PSD program met the general requirements of CAA section 110(a)(2)(C) as of that date, as well as the program requirement to treat nitrogen oxides (NO<sub>x</sub>) as an ozone precursor in accordance with the phase 2 implementation rule for the 1997 ozone NAAQS (72 FR 71612, November 29, 2005). North Dakota's PSD program therefore meets the requirements of section 110(a)(2)(C) with regard to implementation of the 1997 ozone NAAQS.

We also consider the requirements for PSD programs with respect to greenhouse gases (GHGs). North Dakota's PSD program was not subject to EPA's rule, "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans" ("PSD SIP Narrowing Rule"), 75 FR 82536 (Dec. 30, 2010). As explained in a memorandum in the docket for that action, North Dakota stated that it could implement the current SIP-approved PSD program with the thresholds for GHGs set in EPA's June 3, 2010 "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" ("Tailoring Rule"), 75 FR 31514. It was therefore not necessary in the PSD SIP Narrowing Rule to withdraw approval of North Dakota's PSD program to the extent that it applied PSD permitting to GHG emissions increases from GHG-emitting sources below Tailoring Rule thresholds. North Dakota also stated its intent to revise its PSD program to expressly adopt the Tailoring Rule thresholds. North Dakota revised its program correspondingly on April 1, 2011 and submitted the SIP revision to us on April 14, 2011. As a result, North Dakota's 2009 certification

of adequacy of its PSD program remains valid.

North Dakota's April 14, 2011 SIP submittal includes various updates to the State's PSD program. We are reviewing this submittal and intend to propose action on it in the near future. We note that the submittal appears to satisfy the requirements, with respect to the State's PSD program, of the rule "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM<sub>2.5</sub>)," promulgated May 16, 2008 (73 FR 28321). However, we will only reach a final conclusion on the adequacy of the revisions when we act on them through the separate rulemaking.

#### North Dakota's Minor NSR Program

The State has a SIP-approved minor NSR program, adopted under section 110(a)(2)(C) of the Act, which regulates emissions of ozone and its precursors. The State and EPA have relied on the existing state minor NSR program to assure that new and modified sources not captured by the major NSR permitting programs do not interfere with attainment and maintenance of the NAAQS.

In this action, EPA is proposing to approve North Dakota's infrastructure SIP for the 1997 ozone NAAQS with respect to the general requirement in section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. EPA is not proposing to approve or disapprove the State's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program. A number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

4. *Interstate transport:* Section 110(a)(2)(D)(i) requires SIPs to contain adequate provisions prohibiting, consistent with the provisions of this title, any source or other type of

emissions activity within the state from emitting any air pollutant in amounts which will (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other state, with respect to any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other state under part C to prevent significant deterioration of air quality or to protect visibility.

a. *North Dakota's response to this requirement:* The State listed the following provisions to meet this element: (i)(I): NDCC 23-25-03.6; NDCC 23-25-03.7; NDCC 33-25-03.12; SIP Section 7.7 (submitted 4/09); (i)(II): NDCC 23-25-03.4; NDCC 23-25-03.12; SIP Section 7.8 (submitted 4/09).

b. *EPA analysis:* North Dakota submitted SIP revisions to EPA April 6, 2009, which included revisions to the State's interstate transport SIP. EPA approved portions of the State's 110(a)(2)(D)(i) interstate transport SIP for the 1997 ozone NAAQS in separate actions (75 FR 31290; 75 FR 71023), and has not yet completed action on the remaining portion to meet the requirement of 110(a)(2)(D)(i)(II) regarding interference with measures to protect visibility. EPA is taking no action relevant to section 110(a)(2)(D)(i) in this proposal.

5. *Interstate and International transport provisions:* Section 110(a)(2)(D)(ii) requires that each SIP shall contain adequate provisions insuring compliance with applicable requirements of sections 126 and 115 (relating to interstate and international pollution abatement).

a. *North Dakota's response to this requirement:* The State listed the following provisions to meet this element: NDCC 23-25-03.12; SIP Section 7.8 (submitted 4/09).

b. *EPA Analysis:* Section 126(a) of the CAA requires notification to affected, nearby states of major proposed new (or modified) sources. Sections 126(b) and (c) pertain to petitions by affected states to the Administrator regarding sources violating the "interstate transport" provisions of section 110(a)(2)(D)(i). Section 115 of the CAA similarly pertains to international transport of air pollution.

With regard to section 126(a), North Dakota's SIP-approved PSD program requires notice of proposed new sources or modifications to states whose lands may be significantly affected by emissions from the source or modification. This provision satisfies the notice requirement of section 126(a).



North Dakota has no pending obligations under sections 126(c) or 115(b); therefore, its SIP currently meets the requirements of those sections. The SIP therefore meets the requirements of 110(a)(2)(D)(ii) for the 1997 ozone NAAQS.

6. *Adequate resources and authority:* Section 110(a)(2)(E) requires states to provide (i) necessary assurances that the state will have adequate personnel, funding, and authority under state law to carry out the SIP (and is not prohibited by any provision of federal or state law from carrying out the SIP or portion thereof), (ii) requires that the state comply with the requirements respecting state boards under section 128, and (iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any SIP provision, the state has responsibility for ensuring adequate implementation of such SIP provision.

a. *North Dakota's response to this requirement:* The State listed the following provisions to meet this element: (i): NDCC 23–25–04.2; NDAC 33–15–01–15; NDAC 33–15–23; SIP Chapter 9; (ii): NDCC 23–25–02.1; SIP Section 2.15 (submitted 4/09); (iii): NDCC 23–25–02.1; SIP Section 2.7.

b. *EPA analysis:* North Dakota's SIP meets the requirements of section 110(a)(2)(E)(i) for the 1997 ozone NAAQS. NDCC 23–25–03 provides adequate authority for the State of North Dakota to carry out its SIP obligations with respect to the 1997 ozone NAAQS. The State receives sections 103 and 105 grant funds through its Performance Partnership Grant along with required state matching funds to provide funding necessary to carry out North Dakota's SIP requirements. North Dakota submitted an updated version of SIP Chapter 9, "Resources," to EPA on April 6, 2009. In this action, EPA proposes to approve the updated version of SIP Chapter 9, and therefore finds that North Dakota's resources meet the requirements of CAA section 110(a)(2)(E)(i).

With regard to section 110(a)(2)(E)(ii), in its submittal North Dakota stated that section 128 does not apply because the State does not have a board or body that approves permits or enforcement orders under the CAA. We also note that the North Dakota SIP currently does not contain provisions addressing the requirements of section 128 of the CAA.

Congress added section 128 in the 1977 amendments as the result of a conference agreement. Titled "State boards," section 128 provides in relevant part:

(a) Not later than the date one year after August 7, 1977, each applicable implementation plan shall contain requirements that—

(1) Any board or body which approves permits or enforcement orders under [this Act] shall 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 or enforcement orders under [this Act], and

(2) Any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed. In 1978, we issued a guidance memorandum recommending ways states could meet the requirements of section 128, including suggested interpretations of certain terms in section 128.<sup>15</sup>

In order to determine what requirements the North Dakota SIP must satisfy, we discuss various aspects of section 128. We first note that, in the conference report, the committee stated: "It is the responsibility of each state to determine the specific requirements to meet the general requirements of [section 128]."<sup>16</sup> We think that this legislative history indicates that Congress intended states to have some latitude in the specifics of implementing section 128, so long as the implementation is consistent with the plain text of the section. We also note that Congress explicitly provided in section 128 that states could adopt more stringent requirements. As a result, we note three relevant considerations for implementing section 128.

First, section 128 must be implemented through SIP-approved, federally enforceable provisions. Section 128 explicitly mandates that each SIP "shall contain requirements" that satisfy subsections 128(a)(1) and 128(a)(2). A mere narrative description of state statutes or rules, or of a state's current or past practice in constituting a board or body and in disclosing potential conflicts of interest, is not a requirement contained in the SIP and therefore does not satisfy the plain text of section 128.

Second, subsection 128(a)(1) applies only to states that have a board or body that is composed of multiple individuals and that, among its duties, approves permits or enforcement orders

under the CAA. It does not apply in states that have no such multi-member board or body, and where instead a single head of an agency approves permits or enforcement orders under the CAA. This flows from the text of section 128 itself, for two reasons. First, as subsection 128(a)(1) refers to a majority of members in the plural, we think it reasonable to read subsection 128(a)(1) as not creating any requirements for an individual with sole authority for approving a permit or enforcement order under the CAA. Second, subsection 128(a)(2) explicitly applies to the head of an executive agency with "similar powers" to a board or body that approves permits or enforcement orders under the CAA, while subsection 128(a)(1) omits any reference to heads of executive agencies. We infer that subsection 128(a)(1) should not apply to heads of executive agencies who approve permits or enforcement orders.

Third, subsection 128(a)(2) applies to all states, regardless of whether the state has a multi-member board or body that approves permits or enforcement orders under the CAA. Although the title of section 128 is "State boards," the language of subsection 128(a)(2) explicitly applies where the head of an executive agency, rather than a board or body, approves permits or enforcement orders. In instances where the head of an executive agency delegates his or her power to approve permits or enforcement orders, or where statutory authority to approve permits or enforcement orders is nominally vested in another state official, the requirement to disclose adequately potential conflicts of interest still applies. In other words, EPA thinks that SIPs for all states, regardless of whether a state board or body approves permits or enforcement orders under the CAA, must contain adequate provisions for disclosure of potential conflicts of interest.

We propose to apply these considerations to the North Dakota SIP. North Dakota currently does not have a multi-member board or body that approves permits or enforcement orders under the CAA. Instead, permits are approved by the Director of DAQ, and enforcement orders are approved by the Section Chief of the Environmental Health Section. Thus, we propose that North Dakota currently is not subject to the requirements of subsection 128(a)(1).

However, North Dakota is subject to the requirements of section 128(a)(2), and we therefore cannot approve the certification, as originally submitted, with respect to section 110(a)(2)(E)(ii). North Dakota has informed us that the

<sup>15</sup> Memorandum from David O. Bickart, Deputy General Counsel, to Regional Air Directors, Guidance to States for Meeting Conflict of Interest Requirements of Section 128 (Mar. 2, 1978).

<sup>16</sup> H.R. Rep. 95–564 (1977), reprinted in 3 *Legislative History of the Clean Air Act Amendments of 1977*, 526–27 (1978).



North Dakota Department of Health has an ethics policy requiring (among other things) internal disclosure of potential conflicts of interest and recusal from the matter raising the conflict. North Dakota has committed to submit as a SIP revision provisions reflecting this policy, to the extent necessary to meet the requirements of section 128, by July 31, 2013.<sup>17</sup> Because recusal is more stringent than the minimum disclosure required by subsection 128(a)(2), we propose that the policy, if submitted as an enforceable SIP provision, will meet the requirements of section 128. We therefore propose to conditionally approve North Dakota's certification with respect to the requirements of section 128(a)(2).

Finally, with respect to section 110(a)(2)(E)(iii), North Dakota has not assigned responsibility for carrying out portions of the SIP to any local government, agency, or other instrumentality. North Dakota's SIP therefore meets the requirements for this element.

7. *Stationary source monitoring and reporting:* Section 110(a)(2)(F) requires (i) 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 such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to the Act, which reports shall be available at reasonable times for public inspection.

a. *North Dakota's response to this requirement:* The State listed the following provisions to meet this element: (i): NDCC 23–25–03.10; NDAC 33–15–01.12.1; NDAC 33–15–14–02.9; SIP Sections 8.2 and 8.3; (ii) NDAC 23–25–03.10; NDCC 23–25–04.2; 33–15–14–02.9.d; NDAC 33–15–01.12.1; (iii): NDCC 23–25–03.10; NDCC 23–25–06; NDCC 23–25–03.6; NDAC 33–15–01–16.1; NDCC 23–25–04.2; SIP Section 8.2.

b. *EPA analysis:* NDCC section 23–25–03.10 generally requires monitoring, recordkeeping, and reporting for owners and operators of regulated sources. North Dakota's SIP-approved minor source and PSD programs provide for monitoring, recordkeeping, and reporting requirements for sources subject to minor and major source permitting. North Dakota's SIP therefore meets the requirements of section 110(a)(2)(F) for the 1997 ozone NAAQS.

8. *Emergency powers:* Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health, including contingency plans to implement the emergency episode provisions in their SIPs.

a. *North Dakota's response to this requirement:* The State listed the following provisions to meet this element: NDCC 23–25–03.5; NDCC 23–25–03.12; NDCC 23–25–09.5; NDAC 33–15–11; SIP Chapter 5.

b. *EPA analysis:* NDAC 33–15–11 and SIP Chapter 5 provide the State with general emergency authority comparable to that in section 303 of the Act. North Dakota has not monitored any values above the priority cut point for ozone. See 40 CFR 51.150(b)(5). The SIP therefore meets the requirements of 110(a)(2)(G) for the 1997 ozone NAAQS.

9. *Future SIP revisions:* Section 110(a)(2)(H) requires that SIPs provide for revision of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii), except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the SIP is substantially inadequate to attain the NAAQS which it implements or to otherwise comply with any additional requirements under this Act.

a. *North Dakota's response to this requirement:* The State listed the following provisions to meet this element: (i): NDCC 23–25–03.7; NDCC 23–25–03.6; NDCC 23–25–03.8; SIP Section 1.14 (submitted 4/09); (ii): NDCC 23–25–03.6–.8; NDCC 23–25–03.12; SIP Section 1.14 (submitted 4/09).

b. *EPA analysis:* EPA is proposing to approve Section 1.14 of the SIP submitted to EPA April 6, 2009. Section 1.14 requires revision of the SIP in the circumstances enumerated in section 110(a)(2)(H) of the CAA. NDCC section 23–25–03 provides adequate authority for the Department of Health to carry out such revisions. EPA therefore finds that the State has sufficient authority to meet the requirements of 110(a)(2)(H).

10. *Nonattainment Area Plan or Plan Revision under Part D:* Section 110(a)(2)(I) requires that a SIP or SIP revision for an area designated as a nonattainment area must meet the applicable requirements of part D of this subchapter (relating to nonattainment areas).

a. *EPA analysis for Section 110(a)(2)(I):* As noted above, the specific nonattainment area plan requirements of section 110(a)(2)(I) are subject to the timing requirement of section 172, not the timing requirement of section 110(a)(1). This element is therefore not applicable to this action. EPA will take action on part D attainment plans through a separate process.

11. *Consultation with government officials, public notification, PSD and visibility protection:* Section 110(a)(2)(J) requires that each SIP meet the applicable requirements of section 121 of this title (relating to consultation), section 127 of this title (relating to public notification), and part C of this subchapter (relating to PSD of air quality and visibility protection).

a. *North Dakota's response to this requirement:* The State listed the following provisions to meet this element: (section 121): NDCC 23–25–08 (Orders); NDCC 23–25–03.4 and .6; NDAC 33–15–14 and 15; SIP Chapter 10; (section 127): SIP Section 6.9; NDCC 23–25–06.1; (PSD): NDCC 23–25–03.12; NDAC 33–15–15; NDAC 33–15–19; NDAC 33–15–25; NDAC 33–15–02–03.4.

b. *EPA analysis:* The State has demonstrated that it has the authority and rules in place to provide a process of consultation with general purpose local governments, designated organizations of elected officials of local governments and any Federal Land Manager having authority over federal land to which the SIP applies, consistent with the requirements of CAA section 121. EPA previously approved portions of the North Dakota SIP as meeting the requirements of CAA section 127. (45 FR 53475, Aug. 12, 1980).

As discussed above, the State has a SIP-approved PSD program that (for the most part) incorporates by reference the federal program at 40 CFR 52.21. EPA has further evaluated North Dakota's SIP-approved PSD program in this proposed action under IV.3, element 110(a)(2)(C).

Finally, with regard to the applicable requirements for visibility protection, EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the Act. In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus, we find that there are no applicable visibility requirements under section 110(a)(2)(J) when a new NAAQS becomes effective. In conclusion, the North Dakota SIP meets the requirements of section 110(a)(2)(J) for the 1997 ozone NAAQS.

<sup>17</sup> North Dakota's commitment letter is available in the docket.

12. *Air quality and modeling/data:* Section 110(a)(2)(K) requires that each SIP provide for (i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a NAAQS, and (ii) the submission, upon request, of data related to such air quality modeling to the Administrator.

a. *North Dakota's response to this requirement:* The State listed the following provisions to meet this element: (i): NDCC 23–25–03.2 and .12; SIP Section 7.7 (Submitted 4/09); (ii): SIP Section 7.7 (Submitted 4/09); NDCC 23–23–06.1.

b. *EPA analysis:* North Dakota's SIP meets the requirements of CAA section 110(a)(2)(K) for the 1997 ozone NAAQS. In particular, North Dakota's PSD program requires estimates of ambient air concentrations be based on applicable air quality models specified in Appendix W of 40 CFR part 51, and incorporates by reference the provision at 40 CFR 52.21(l)(2) requiring that modification or substitution of a model specified in Appendix W must be approved by the Administrator. EPA also proposes to approve the addition of SIP section 7.7, submitted April 6, 2009, as meeting the requirements of this section 110(a)(2)(K)(ii). As a result, the SIP provides for such air quality modeling as the Administrator has prescribed.

13. *Permitting fees:* Section 110(a)(2)(L) requires SIPs to require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this act, a fee sufficient to cover (i) the reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under title V.

a. *North Dakota's response to this requirement:* The State listed the following provisions to meet this element: (i): NDCC 23–25–04.2; NDAC 33–15–23; (ii): NDAC 23–25–04.2; NDAC 33–15–23.

b. *EPA analysis:* North Dakota's submittal meets the requirements of CAA section 110(a)(2)(L) for the 1997 ozone NAAQS. Final approval of the title V operating permit program became

effective June 17, 1999 (64 FR 32433). As discussed in that approval, the State demonstrated that the fees collected were sufficient to administer the program. In addition, the SIP contains fee provisions for construction permits (NDAC 33–15–23–02), including costs of processing not covered by the application fee. The SIP also contains fee provisions for minor source operating permits (NDAC 33–15–23–03).

14. *Consultation/participation by affected local entities:* Section 110(a)(2)(M) requires states to provide for consultation and participation in SIP development by local political subdivisions affected by the SIP.

a. *North Dakota's response to this requirement:* The State listed the following provisions to meet this element: NDCC 23–25–03.4; SIP Chapter 10.

b. *EPA analysis:* North Dakota's submittal meets the requirements of CAA section 110(a)(2)(M) for the 1997 ozone NAAQS.

#### V. What action is EPA taking?

In this action, EPA is proposing to approve in full the November 23, 2009 certification for the following section 110(a)(2) infrastructure elements for North Dakota for the 1997 ozone NAAQS: (A), (B), (C), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J), (K), (L), and (M). EPA is proposing to conditionally approve the November 23, 2009 certification for infrastructure element 110(a)(2)(E)(ii) for the 1997 ozone NAAQS. EPA is taking no action on infrastructure elements (D)(i), (I), and the visibility protection requirement of (J) for the 1997 ozone NAAQS. In this action, EPA also proposes to approve portions of North Dakota's April 6, 2009 SIP submission. Specifically, EPA proposes to approve North Dakota's revisions to SIP sections 6.8, 6.11.3, and chapter 9, and the additions of SIP sections 1.14 and 7.7.

#### VI. Statutory and Executive Order Reviews

Under the CAA, 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 proposed action merely approves some state law as meeting Federal requirements and disapproves other state law because it does not meet Federal requirements; this proposed action does not impose additional requirements beyond those

imposed by state law. For that reason, this proposed 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 (Pub. L. 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).

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.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: March 30, 2012.

**James B. Martin,**

*Regional Administrator, Region 8.*

[FR Doc. 2012–0075 Filed 4–13–12; 8:45 am]

**BILLING CODE 6560–50–P**