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ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 52**

[EPA-R08-OAR-2009-0557; FRL-9229-1]

Approval and Promulgation of State Implementation Plan Revisions; State of North Dakota; Interstate Transport of Pollution for the 1997 PM_{2.5} and 8-Hour Ozone NAAQS: "Interference With Maintenance" Requirement**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: EPA is partially approving the State Implementation Plan revisions submitted by the State of North Dakota on April 6, 2009. Specifically, EPA is approving the portions of the "Interstate Transport of Air Pollution" revisions addressing the "interference with maintenance" requirement of Clean Air Act (CAA) section 110(a)(2)(D)(i) for the 1997 PM_{2.5} and 8-hour ozone National Ambient Air Quality Standards (NAAQS). The "interference with maintenance" requirement of section 110(a)(2)(D)(i) prohibits a state's emissions from interfering with maintenance of the NAAQS by any other state. This action is being taken under section 110 of the CAA.

DATES: *Effective Date:* This final rule is effective December 22, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2009-0557. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <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.

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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 words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.

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

(iv) The words *State* or *North Dakota* mean the State of North Dakota, unless the context indicates otherwise.

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I. Background

On July 18, 1997, EPA promulgated new standards for 8-hour ozone and fine particulate matter (PM_{2.5}). This action is being taken in response to the July 18, 1997 revision to the 8-hour ozone NAAQS, and PM_{2.5} NAAQS. This action does not address the requirements for the 2006 24-hour PM_{2.5} NAAQS, or the 2008 8-hour ozone NAAQS; those standards will be addressed in a later action.

Section 110(a)(1) of the CAA requires states to submit SIPs to address a new or revised NAAQS within 3 years after promulgation of such standards, or within such shorter period as EPA may prescribe. Section 110(a)(2) lists the elements that such new SIPs must address, as applicable, including section 110(a)(2)(D)(i) which pertains to interstate transport of certain emissions. Section 110(a)(2)(D)(i) of the CAA requires that a state's SIP must contain adequate provisions prohibiting any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in any other state; (2) interfere with maintenance of the NAAQS by any other state; (3) interfere with any other state's required measures to prevent significant deterioration of air quality;

or (4) interfere with any other state's required measures to protect visibility.

On April 6, 2009 the State of North Dakota submitted a SIP addressing the section 110(a)(2)(D)(i) four requirements, noted above, for the 1997 8-hour ozone NAAQS and for the 1997 annual and 24-hour PM_{2.5} NAAQS. The state based its submittal on EPA's 2006 Guidance discussed below. As noted earlier, in this rulemaking EPA is addressing the requirement that pertains to preventing sources in the State from emitting pollutants in amounts which will interfere with the maintenance of the 1997 ozone and PM_{2.5} NAAQS by any other state.

On August 15, 2006, EPA issued its "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_{2.5} National Ambient Air Quality Standards" (2006 Guidance) for SIP submissions that states should use to address the requirements of section 110(a)(2)(D)(i). EPA developed this guidance to make recommendations to states for making submissions to meet the requirements of section 110(a)(2)(D)(i) for the 1997 ozone NAAQS and 1997 PM_{2.5} NAAQS.

In a **Federal Register** action dated September 17, 2010, EPA proposed approval of the North Dakota Interstate Transport SIP portions addressing the interference with maintenance requirement of section 110(a)(2)(D)(i). EPA concluded in its proposed action that the various factual and technical considerations supported a determination that emissions from North Dakota do not interfere with maintenance by any states with areas at risk for maintenance of the 1997 8-hour ozone NAAQS or for maintenance of the 1997 annual and 24-hour PM_{2.5} NAAQS.

EPA did not receive comments that persuade the Agency that there is such interference with maintenance for the 1997 ozone or PM_{2.5} NAAQS and thus in today's final action EPA is making a final regulatory determination that North Dakota's sources do not interfere with maintenance of the 1997 8-hour ozone NAAQS, and the 1997 PM_{2.5} NAAQS in any other state.

II. Response to Comments

EPA received one letter dated October 18, 2010 with comments from the WildEarth Guardians (WG) environmental organization. The WG letter includes three separate comments identifiable under sections A., B., and C., and is accessible online at [regulations.gov](http://www.regulations.gov) under Docket No. EPA-R08-OAR-2009-0057. Later in this section EPA responds to the significant

comments made by the commenter. WG clarifies in its introductory remarks on the letter's first page that its comments are directed to both the Colorado and the North Dakota Federal Register proposed rule actions of September 17, 2010 (75 FR 56935 and 75 FR 56928) because "EPA's rationale for approving both SIPs is the same." EPA will consider WG's comments, as appropriate, equally applicable to the referenced EPA proposed rule actions for the Colorado and the North Dakota interstate transport SIPs. For clarity, however, in this action EPA will address WG's comments as if they were directed only to the proposed rule action for North Dakota (75 FR 56928).¹

Comment No. 1—In its comments under section A., "Maintenance is Inappropriately Defined," WG states that EPA's definition of interference with maintenance, and by implication the identification of maintenance receptors, appeared to be "inappropriately conflated with the definition of nonattainment." It argues that the definition of maintenance appeared to be tied to nonattainment, asserting that "unless an area has violated or is in violation of the NAAQS, the agency will not consider whether * * * North Dakota [is] interfering with that area's ability to maintain compliance with the NAAQS." For this reason, WG argues EPA did not give independent meaning to the interfere with maintenance prong of section 110(a)(2)(D)(i)(I).

EPA Response—The methodology EPA used to identify maintenance receptors gives independent meaning to the term "interfere with maintenance" and establishes a process to identify projected attainment receptors that, based on the historic variability of air quality at that site (which may be due to variability in emissions and/or meteorology), may have difficulty maintaining the standard. As explained in greater detail below, the commenter's objection to EPA's approach appears to be based on the misconception that the methodology EPA used to identify maintenance sites was dependent on base year NAAQS violations.

The definition of maintenance used by EPA is consistent with the direction given to EPA by the Court of Appeals for the DC Circuit in *North Carolina v. EPA*, 531 F.3d 896 (DC Cir. 2008).² In that

case, the court analyzed the definition of "interfere with maintenance" used in the Clean Air Interstate Rule (CAIR). The court found that the definition EPA used "gave no independent significance to the 'interfere with maintenance' prong of section 110(a)(2)(D)(i) to separately identify upwind sources interfering with downwind maintenance."³ It further reasoned that "[u]nder EPA's reading of the statute, a state can never 'interfere with maintenance' unless EPA determines that at one point it 'contribute[d] significantly to nonattainment'."⁴ Based on this analysis, the court found the definition unlawful, holding that "[b]ecause EPA describes CAIR as a complete remedy to a section 110(a)(2)(D)(i)(I) violation and does not give independent significance to the 'interfere with maintenance' language to identify upwind states that interfere with downwind maintenance, it unlawfully nullifies that aspect of the statute and provides no protection for downwind areas that, despite EPA's predictions, still find themselves struggling to meet NAAQS due to upwind interference in 2010."⁵

The approach used by EPA in its September 17, 2010 proposal to assess whether emissions from sources in North Dakota interfere with maintenance of the NAAQS in any other state takes into account the flaws identified by the court, by giving independent meaning to the section 110(a)(2)(D)(i) "interference with maintenance" requirement. Our September 17, 2010 proposed action relies on a process established by EPA's August 2, 2010 Transport Rule Proposal to identify any specific receptors in downwind states that, even though they are projected to be in attainment and thus would not be nonattainment receptors, may have difficulty maintaining the NAAQS in question. These receptors are referred to as maintenance receptors.

The commenter's statement that EPA's designation of maintenance receptors is "firmly hitched to a finding that the maximum design value based on a single three-year period between 2003 and 2007 is in excess of the NAAQS" appears to be based on a misunderstanding of the methodology

used by EPA to identify maintenance receptors. EPA's methodology did not, as the commenter appears to assume, require a site to have a design value above the NAAQS for one of the three base periods (2003–2005, 2004–2006, 2005–2007) to be considered a maintenance site. The methodology is based on an analysis of the future year average and future year maximum design values.⁶ It does not depend on the whether the base year design values exceed the NAAQS. The Transport Rule Proposal explained that EPA used the average concentrations of the three design values for three base periods noted above to determine the 2012 average design value at monitoring sites. Monitoring sites with projected average design values above the NAAQS would be in nonattainment, while those with projected average design values below the NAAQS would be in attainment in 2012. To identify among the attainment monitoring sites those at risk for maintenance of the NAAQS, EPA also projected to 2012 each of the three design values for the base periods noted above. If the maximum of the three was above the NAAQS, then monitoring site was identified as at risk for maintenance of the NAAQS, or as a "maintenance receptor."⁷ The maximum design value referenced in this sentence is the maximum future design value calculated using each of the three base design value periods separately. Whether or not one of the three base period design values exceeded the NAAQS was not a factor considered in determining whether a site was a maintenance receptor.

To better understand this concept, it is useful to compare the methodologies used in the Transport Rule proposal (75 FR 45210, Aug. 2, 2010) to identify nonattainment and maintenance receptors. In the Transport Rule proposal, base period (2003–2007) ambient data were projected to the future (using model outputs) to identify both nonattainment and maintenance receptors. In both cases, receptors were identified by projected future design values; however, because more conservative data were used for the maintenance analysis, this analysis could identify receptors that were projected by the nonattainment analysis to be in attainment; yet might have difficulty attaining the standard due to historic variability of air quality at that site. To identify future nonattainment

¹ Similarly, in our response to the same WG comments in our action finalizing the proposed rule action of September 17, 2010 for the Colorado "interference with maintenance" requirement we address WG's comments as if they were directed to the proposed rule action for Colorado (75 FR 56935).

² As EPA noted in the proposal, the term "interfere with maintenance" is not defined in the

CAA. As such, the term is ambiguous and EPA's interpretation of that term in this action is both reasonable and consistent with the text and the overall goals of the CAA. By this approach, EPA is giving independent meaning to the term and supporting that interpretation with technical analysis to apply it to the facts in this action.

³ 531 F.3d at 910.

⁴ *Id.*

⁵ *Id.* at 910–11.

⁶ The process that defines the monitors at risk for maintenance was summarized in the September 17, 2010 proposed rule action for the North Dakota Interstate Transport SIP (75 FR 56928).

⁷ 75 FR 45210, at 45246.

sites we calculated the future year design values by projecting the 5-year weighted average design value for each site. Only if this future year design value exceeded the NAAQS was the site considered to be a nonattainment receptor. However, to identify projected maintenance sites we used a different methodology that took into account historic variability in air quality at each receptor. For this approach we calculated the maximum future year design value by processing each of the three base design value periods (2003–2005, 2004–2006, and 2005–2007) separately. The highest of the three future values is the maximum design value, which is used to determine maintenance receptors.

In this way, EPA's analysis identifies those areas that are projected to be attainment, but may have difficulty maintaining attainment of the standard, for example in a year with particularly severe meteorology (weather that is conducive to ozone and/or particulate formation). In other words, this analysis does exactly what the D.C. Circuit directed EPA to do in *North Carolina*. It gives independent meaning to the "interfere with maintenance" prong of 110(a)(2)(D)(i) and provides protection to any areas that, although they are predicted to attain the standard (and thus upwind sources could not be found to significantly contribute to nonattainment in that area) may have difficulty maintaining the standard.⁸

EPA used this same approach to identify any potential maintenance receptors for purposes of evaluating North Dakota's SIP submission. For the reasons explained above, this approach is both reasonable and consistent with the direction given to EPA by the DC Circuit in *North Carolina*.

Comment No. 2—In its comments under section B., "Even Under EPA's Definition of Maintenance, Maintenance Receptors are not Consistently Defined," WG cited a variety of information suggesting that that receptors in the Denver Metropolitan Area/North Front Range (DMA/NFR) area should also be considered for maintenance purposes under 110(a)(2)(D)(i) in this action. The commenter points out that EPA itself has stated, "Data for 2005–2007 and 2006–2008 reflect violations of the 8-hour ozone NAAQS at the Rocky Flats North monitor (values of [0.085] and 0.086 ppm, respectively)." The commenter also argued that modeling prepared in conjunction with Colorado's DMA/NFR attainment demonstration shows that by 2010, the three-year design value is only projected to be

lowered to 0.084 parts per million, barely in compliance with the NAAQS, and that certain portions of the DMA/NFR area of Colorado would violate the 1997 ozone NAAQS in 2010 at grid cells west of Fort Collins. The commenter referenced several documents that are part of the Colorado's DMA/NFR 8-hour Ozone Attainment Demonstration in support of its arguments. The commenter cited the report's language that indicated that the modeling projection of a value above the 1997 8-hour standard to the west of Fort Collins is not "implausible" and explaining, "In the case of the Denver ozone modeling, higher ozone concentrations are estimated west of Fort Collins than at the locations of the two monitors in Fort Collins on some days and this does not appear to be an error in the modeling system."⁹ Finally, the commenter argued that EPA's failure to consider the DMA/NFR area as a receptor for evaluating interference with maintenance in this action reflects the very problem that the D.C. Circuit warned could result without giving independent meaning to the term "interfere with maintenance."¹⁰

EPA's Response—EPA disagrees with WG's argument that EPA has inappropriately identified the correct monitors for maintenance receptors. As discussed in greater detail in the previous response to comment no. 1, EPA has selected a method that identifies maintenance receptors separately from nonattainment receptors and gives an independent meaning to the interfere with maintenance prong of section 110(a)(2)(D)(i). EPA has consistently applied this method to all potential receptors in States potentially impacted by North Dakota's emissions including those in the DMA/NFR area.

The commenter's argument EPA did not consistently identify maintenance receptors is premised on the same fundamental misunderstanding discussed in response to comment no.

⁹ The commenter referenced the Colorado Department of Public Health and Environment's "2010 Ozone Attainment Demonstration Modeling for the Denver 8-hour Ozone State Implementation Plan Control Strategy" and the Environ modeling report "Final 2010 Ozone Attainment Demonstration Modeling for the Denver 8-hour Ozone State Implementation Plan."

¹⁰ This comment also expresses concern about the Wasatch Front and Uinta County areas in Utah, the Phoenix area of Arizona, portions of western Wyoming, and Juan County in New Mexico as at risk for maintenance for the 1997 8-hour ozone NAAQS. According to WG, the proposed EPA's September 17, 2010 proposed rule assessment of the Colorado's emissions impacts on maintenance of the NAAQS by other states should have included the evaluation of Colorado emissions on the areas noted above. We respond to that portion of this comment in the final rulemaking for the Colorado interstate transport SIP submitted June 18, 2009.

1—that EPA's identification of nonattainment receptors was based on current or past NAAQS violations. As explained above, this is not correct. EPA did not base its identification of maintenance receptors on an analysis of whether air quality at those receptors exceeded the NAAQS in the base years. The methodology EPA used to identify maintenance areas takes into account historic variability of emissions at specific monitoring sites to analyze whether or not monitoring sites projected to be in attainment in 2012 will nonetheless remain at risk of slipping into nonattainment in that year. The commenter provided a number of modeling or monitoring analyses for 2010 or earlier. As we have addressed in responses elsewhere in this notice, EPA continues to believe 2012 is the appropriate year for this analysis. Thus, modeling or monitoring data for other years is not directly relevant to this rulemaking. Nonetheless, below we address the commenter's specific assertions about the monitoring and modeling.

The commenter asserts that monitoring data for 2005–07 and 2006–08 for the Rocky Flats North monitor reflect violations of the 8-hour NAAQS and therefore EPA should consider this Rocky Flats North monitor as a "maintenance receptor." The commenter further cites to modeling prepared in conjunction with Colorado's DMA/NFR attainment demonstration to support its assertion that EPA has applied inconsistently its definition of interference with maintenance. The modeling data referenced by the commenter, however, only identifies monitors that, in the commenter's view, are at risk of being in nonattainment or having maintenance problems in 2010. The monitoring data cited indicates high ozone levels in the past. The underlying issue raised is thus substantively the same as that raised in comment no. 3 below which argues that EPA's analysis is faulty because it identifies receptors likely to have difficulty maintaining the standard in 2012 and not at the present or in the past. EPA's response to comment no. 3 below, illustrates how its approach, based on modeling analyses that identify receptors at risk for maintenance in the year 2012, is appropriate and consistent with the D.C. Circuit decision in *North Carolina v. EPA*.

EPA's method is based on model projection values that take into account multi-year variability in ozone data at specific monitors. For identification of maintenance receptors, EPA utilized the monitoring data from the 2003–2007

⁸ *Id.* at 45246.

period to calculate 2012 future year modeling design value projections. The 2003–07 period includes three Design Value (DV) periods (2003–2005, 2004–2006, and 2005–2007). The 2012 future year DVs were calculated by multiplying a 3-year DV (base year) by the ratio of the Future Year average of the daily 8-hour ozone maximums around a monitor over the Base Year average of the daily 8-hour ozone maximums around a monitor. This calculation was performed for each of the three 3-year DVs (2003–2005, 2004–2006, and 2005–2007). This approach yielded three different projected 2012 design values and thus, tests for variability in meteorology. If any of the three 2012 projections was above the 1997 ozone standard, then the receptor would be considered a maintenance receptor. None of the 2012 projections for the DMA/NFR area was above the standard so the area was not considered a maintenance area. This approach was the same as the approach used for every potential receptor evaluated. It is worth noting that EPA's analysis included the 2005–2007 data for the Rocky Flats monitor (which is one of the highest monitored DVs in recent years for this monitor) that the commenter raised as a concern and pursuant to its methodology as previously described EPA's analysis determined that the Rocky Flats monitor would not be a maintenance receptor in 2012.

Further, EPA disagrees with commenter's conclusion that the modeling performed for the DMA/NFR attainment demonstration with the 2010 model projections establishes that any of the areas identified will have maintenance problems for the 1997 8-hour ozone NAAQS. We disagree with WG's conclusion that the DMA/NFR area monitors should be identified as "maintenance receptors" in large part because it bases its conclusion on projections for 2010 instead of 2012. This modeling used projections for 2010 not 2012, which as explained above and in response to comment no. 3 below is not the correct year for comparison, given the approach EPA has developed for determining maintenance receptors. EPA's analysis of maintenance receptors, which is based on the approach developed in the Transport Rule Proposal to be consistent with the D.C. Circuit's opinion in *North Carolina v. EPA* and uses projections for 2012, did not identify any maintenance receptors in the DMA/NFR area. This conclusion is consistent with evidence suggesting emissions are likely to trend downward (for example, with two more years of fleet turnover, this modeling

would likely have projected lower levels of ozone in 2012) and preliminary monitoring data for 2010, which indicates that the DMA/NFR area is meeting the 1997 ozone standard. Further, EPA has reviewed Colorado's attainment demonstration for the DMA/NFR area and proposed that the combination of the modeling and Weight of Evidence analyses demonstrates that Denver will be in attainment in 2010.¹¹

In addition, the commenter's concern that an area west of Fort Collins, might exceed 84 ppb in 2010 is based on exceedance values in the Colorado modeling analysis from a special analysis, called the Unmonitored Area Analysis (UAA), that is recommended for model grid cells that are not analyzed in the monitor based attainment demonstration because they are not located near a monitor. EPA does not believe that the UAA establishes that this area should be considered a maintenance receptor area for the purposes of 110(a)(2)(D)(i).

First, the UAA analysis is for 2010, which as noted above is not the correct analysis year. Second, EPA guidance indicates that NAAQS violations in the UAA should be handled on a case by case basis.¹² The guidance stresses that due to the lack of measured data, the examination of ozone concentrations as part of the unmonitored area analysis is more uncertain than the monitor based attainment test. This is true even in situations such as this where, as the commenter points out; no known errors were identified by the contractor in the modeling analysis. As a result, the UAA results are recommended to be treated as a separate test from the monitor based attainment test with less weight put on the conclusions of the UAA analysis. EPA's attainment demonstration guidance indicates, "While it is expected that States will implement additional emission controls to eliminate predicted violations of the monitor based test, the same requirements may not be appropriate in unmonitored areas."¹³ The guidance recommends that it may be appropriate to deploy additional monitors in an area where the unmonitored analysis

indicates a potential future year violation.

To address the concerns raised by the UAA, Colorado installed an additional ozone monitor in the area West of Fort Collins to determine whether the model predicted ozone concentrations are, in fact, valid. The special purpose monitor, located in Rist Canyon, began operation on May 14, 2009. The Rist Canyon monitoring station has collected data for two ozone seasons (approximately 16 months) since it began operating and the fourth highest daily maximum 8-hour average ozone concentration reading is 69 ppb for May through December of 2009 and 72 ppb for January through August 2010.¹⁴

Therefore, EPA does not believe the modeling performed for the State of Colorado's Denver/NFR area SIP can support the conclusion that this area should be considered a maintenance receptor area for the purposes of 110(a)(2)(D)(i). The methodology developed to identify maintenance receptors for the purpose of analyzing interference with maintenance with respect to the 1997 ozone and PM_{2.5} NAAQS relies on base period monitoring data to identify monitor locations that are projected to have maintenance problems in 2012. The methodology does not identify receptors based on modeling data alone. While the monitor has not operated long enough to account for variability in ozone levels, the newly installed monitor in the relevant area is reading well below the standard and this fact further confirms that the modeling results and the UAA results do not support the conclusion that receptors in the DMA/NFR area should be considered maintenance receptors for the purpose of CAA section 110(a)(2)(D)(i).

In conclusion, EPA disagrees with the commenter. We have used a fully consistent approach in identifying areas that may have difficulty in maintaining attainment of the NAAQS. It is these areas that we have further evaluated to see if North Dakota's emissions would interfere with maintenance of the NAAQS.

Comment No. 3—In its comment under section C., "EPA has not Assessed New Mexico's [sic] Interference with

¹¹ EPA's "Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, PM_{2.5}, and Regional Haze," EPA-454/B-07-002, April 2007. Also, 75 FR 42346 (July 21, 2010) [EPA-R08-OAR-2010-0285; FRL-9177-2], Proposed Rule, "Approval and Promulgation of Air Quality Implementation Plans; Colorado; Attainment Demonstration for the 1997 8-Hour Ozone Standard, and Approval of Related Revisions"; at 42346-61.

¹² *Id.*

¹³ *Id.* at 32.

¹⁴ The Rist Canyon monitoring station uses a Federal Equivalent Method (FEM) and follows the quality assurance requirements of 40 CFR Part 58 Appendix A. Ozone data collected at this monitoring station is eligible for comparison to the ozone NAAQS after the monitor has operated for more than 24 months per 40 CFR 58.30(c). Design values, however, are based on the 3-year average of the annual fourth highest daily maximum 8-hour average ozone concentration (see 40 CFR part 50, Appendix D).

Maintenance in the Present,” WG asserts that EPA’s analysis ignores whether North Dakota is, at the present, interfering with maintenance of the 1997 8-hour ozone NAAQS, and the 1997 PM_{2.5} NAAQS, in other States. It argues EPA erred by considering only whether emissions from North Dakota will interfere with maintenance in areas that by 2012 would be considered “maintenance receptors.”

WG argues that this approach is inconsistent with the approach taken to determine whether New Mexico significantly contributes to nonattainment in other States (citing 75 FR 33174–33190) and that this alleged inconsistent application “raises serious concerns that EPA is again simply finding excuses to avoid requiring North Dakota to do its part to limit air pollution that adversely affects neighboring states, including Colorado.” They agree that “EPA should ensure that North Dakota does not interfere with maintenance or contribute significantly to nonattainment in other states in the future” but argue that “the agency’s duties under Section 110(a)(2)(D)(i)(I) apply both in the present and the future. EPA’s approach is flawed, WG concludes, because EPA identifies maintenance areas likely to exist by 2012 and does not identify maintenance areas that currently exist. WG also asserts that EPA’s approach ignores whether North Dakota is presently interfering with maintenance of the 1997 8-hour ozone NAAQS in downwind states.¹⁵

EPA Response—EPA disagrees with the commenter concerning the evaluation of significant contribution versus interference with maintenance. Section 110(a)(2)(D)(i)(I) of the Clean Air Act requires that a state SIP “contain adequate provisions prohibiting * * * any source or other type of emission activities within the state from emitting any air pollutants in amount which will contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any [] national primary or secondary ambient air quality standard.”

In determining the appropriate year to analyze to determine whether emissions from North Dakota will interfere with maintenance by any other State, EPA used an approach upheld by the DC Circuit in *North Carolina v. EPA*. In that case, the Court examined EPA’s definition of “will” in “will contribute

significantly.” The placement of the word “will” at the end of section 110(a)(2)(D)(i) clarifies that it applies to all of the provisions that follow—both those in 110(a)(2)(D)(i)(I) and those in 110(a)(2)(D)(i)(II). Thus the DC Circuit’s discussion of the meaning of the word “will” in “will significantly contribute” also applies to the meaning of the word will in “will * * * interfere with maintenance.”

In *North Carolina v. EPA*, the DC Circuit rejected North Carolina’s argument that EPA erred in limiting its analysis of downwind areas by excluding areas that were currently monitored nonattainment but projected to be in attainment at a future date. Like WG argues here, North Carolina had argued that EPA was obligated to analyze the significant contribution of states that were contributing to areas of North Carolina that were in nonattainment at the time the rule was promulgated even though those areas were projected to come into attainment by the year selected for the future base case analysis. In rejecting this argument, the DC Circuit explained that the approach used by EPA was identical to the one used previously in the NO_x SIP Call and that “because ‘will’ can mean either certainty or indicate the future tense,” EPA’s approach was reasonable. In other words, the court approved EPA’s approach that entailed the evaluation of interstate transport impacts at a future date in time.

Contrary to the assertions of the commenter, EPA believes that evaluation of interference with maintenance using a future date is the most appropriate approach for that requirement. As explained in the proposed action, the court decision affecting the CAIR rule required EPA to reevaluate its approach to the interfere with maintenance requirement of section 110(a)(2)(D) and to develop a new approach to give that requirement separate meaning. In doing so, EPA has developed an approach that necessarily requires a number of years of data, and an analysis that evaluates where there may be difficulties with maintaining attainment at a specific point in time, in this instance 2012. In the prior action cited by WG, EPA’s evaluation of whether emissions would significantly contribute to nonattainment in other states was based on the data available at the time of that evaluation and before EPA had developed its approach for evaluating interference with maintenance. It is reasonable and appropriate for EPA to use, in this rulemaking, the current approach to identifying maintenance receptors for purposes of section 110(a)(2)(D)(i) that

EPA developed to be consistent with the direction given to EPA in *North Carolina v. EPA*.

Finally, we note that comments on the validity or reasonableness of the approach to determining significant contribution are not directly relevant to this rulemaking. This rulemaking addresses only the “interfere with maintenance” requirement of section 110(a)(2)(D)(i). EPA published a prior proposal (75 FR 16026) and final rule (75 FR 31290) analyzing the North Dakota SIP submission for the “significant contribution” prong of section 110(a)(2)(D)(i).

III. Final Action

The Environmental Protection Agency is approving portions of the Interstate Transport of Air Pollution SIP submitted by the State of North Dakota on April 6, 2009. Specifically, in this action EPA is approving the language in Section 7.8.1, subsection B., “Nonattainment and Maintenance Area Impact,” that specifically addresses element (2) of section 110(a)(2)(D)(i), the requirement that the SIP contain adequate provisions prohibiting emissions from North Dakota from interfering with maintenance of the NAAQS by any other state. EPA has concluded that the evidence evaluated by EPA establishes that emissions from North Dakota sources do not interfere with maintenance of the 1997 8-hour ozone or the 1997 PM_{2.5} NAAQS in any other state. Therefore, the State’s SIP does not need to include additional substantive controls to reduce emissions for purposes of section 110(a)(2)(D)(i)(I) for these NAAQS.

IV. Statutory and Executive Order Review

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this 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 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

¹⁵ Before addressing the substantive issues raised in this comment, we would like to clarify that we presume that the reference to New Mexico in the comment’s title is a clerical error, and that the commenter intended to refer to either Colorado or North Dakota.

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 Clean Air Act; 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.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 21, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed,

and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

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

Dated: November 10, 2010.

James B. Martin,

Regional Administrator, Region 8.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart JJ—North Dakota

■ 2. Section 52.1820 is amended in the table in paragraph (e) by revising the entry in “(1)” and adding entry “(22)” in numerical order to read as follows:

§ 52.1820 Identification of plan.

* * * * *
(e) * * *

Name of nonregulatory SIP provision	Applicable geographic or non-attainment area	State submittal date/ adopted date	EPA approval date and citation ³	Explanations
(1) Implementation Plan for the Control of Air Pollution for the State of North Dakota.	Statewide	Submitted: 1/24/72; Adopted: 1/24/72.	5/31/72, 37 FR 10842.	Excluding subsequent revisions, as follows: Chapters 1, 2, 6, 7, 9, 11, and 12; Sections 2.11, 3.7, 6.8, 6.10, 6.11, 6.13, 7.7, and 8.3; subsections 7.8.1.B., 7.8.1.D., and 8.3.1. Revisions to these non-regulatory provisions have subsequently been approved. <i>See</i> below.
Chapters	Clarification submitted: 6/14/73; 2/19/74; 6/26/74; 11/21/74; 4/23/75.	With all clarifications: 3/2/76; 41 FR 8956.	
1. Introduction. 2. Legal Authority. 3. Control Strategy. 4. Compliance Schedule. 5. Prevention of Air Pollution Emergency Episodes. 7. Review of New Sources and Modifications. 8. Source Surveillance. 9. Resources. 10. Inter-governmental Cooperation. 11. Rules and Regulations.				
With subsequent revisions to the chapters as follows:				

Name of nonregulatory SIP provision	Applicable geographic or non-attainment area	State submittal date/ adopted date	EPA approval date and citation ³	Explanations
(22) Section 7.8, Interstate Transport of Air Pollution (only portion of 7.8.1.B.).	Statewide	Submitted: 4/09/09; Adopted: 4/01/09.	11/22/10 [insert FR page number where document begins].	Includes portions of Subsection 7.8.1.B., "Nonattainment and Maintenance Area Impact," that specifically address the "interference with maintenance" requirement of CAA Section 110(a)(2)(D)(i).

³In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular pro

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2007-1035; FRL-9229-2]

Approval and Promulgation of State Implementation Plans; State of Colorado; Interstate Transport of Pollution Revisions for the 1997 8-Hour Ozone NAAQS: "Interference With Maintenance" Requirement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is partially approving State Implementation Plan (SIP) revisions submitted by the State of Colorado on June 18, 2009. Specifically, EPA is approving the portions of the "State of Colorado Implementation Plan to Meet the Requirements of Clean Air Act (CAA) Section 110(a)(2)(D)(i)(I)—Interstate Transport Regarding the 1997 8-Hour Ozone Standard" addressing the "interference with maintenance" requirement of section 110(a)(2)(D)(i)(I) for the 1997 8-hour ozone National Ambient Air Quality Standards (NAAQS) by any other state. The "interference with maintenance" requirement of section 110(a)(2)(D)(i)(I) prohibits a state's emissions from interfering with maintenance of the NAAQS by any other state. This action is being taken under section 110 of the CAA.

DATES: Effective Date: This final rule is effective December 22, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2007-1035. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose

disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <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: Domenico Mastrangelo, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-6416, mastrangelo.domenico@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 words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.

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

(iv) The words *Colorado* and *State* mean the State of Colorado.

Table of Contents

- I. Background
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I. Background

On July 18, 1997, EPA promulgated new standards for 8-hour ozone and fine particulate matter (PM_{2.5}). This action is being taken in response to the July 18,

1997 revision to the 8-hour ozone NAAQS. This action does not address the requirements for the 1997 PM_{2.5} NAAQS, the 2006 PM_{2.5} NAAQS, or the 2008 8-hour ozone NAAQS; those standards will be addressed in a later action.

Section 110(a)(1) of the CAA requires states to submit SIPs to address a new or revised NAAQS within 3 years after promulgation of such standards, or within such shorter period as EPA may prescribe. Section 110(a)(2) lists the elements that such new SIPs must address, as applicable, including section 110(a)(2)(D)(i) which pertains to interstate transport of certain emissions. Section 110(a)(2)(D)(i) of the CAA requires that a state's SIP must contain adequate provisions prohibiting any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in any other state; (2) interfere with maintenance of the NAAQS by any other state; (3) interfere with any other state's required measures to prevent significant deterioration of air quality; or (4) interfere with any other state's required measures to protect visibility.

On June 18, 2009 the State of Colorado submitted a SIP addressing the section 110(a)(2)(D)(i)(I) requirements (1) and (2), noted above, for the 1997 8-hour ozone NAAQS. The state based its submittal on EPA's 2006 Guidance discussed below. As noted earlier, in this rulemaking EPA is addressing the requirement that pertains to preventing sources in the State from emitting pollutants in amounts which will interfere with the maintenance of the 1997 8-hour ozone NAAQS by any other state.

On August 15, 2006, EPA issued its "Guidance for State Implementation Plan (SIP) Submission to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and PM_{2.5} National Ambient Air Quality Standards" (2006 Guidance) for SIP submissions that states should use to