

§ 52.2355 Section 110(a)(2) infrastructure requirements.

On December 3, 2007 Jon L. Huntsman, Jr., Governor, State of Utah, submitted a certification letter which provides the State of Utah's SIP provisions which meet the requirements of CAA Section 110(a)(1) and (2) relevant to the 1997 Ozone NAAQS. On December 21, 2009 M. Cheryl Heying, Director, Utah Division of Air Quality, Department of Environmental Quality for the State of Utah, submitted supporting documentation which provides the State of Utah's SIP provisions which meet the requirements of CAA Section 110(a)(1) and (2) relevant to the 1997 Ozone NAAQS.

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ENVIRONMENTAL PROTECTION AGENCY

[EPA-R08-OAR-2009-0809; FRL-9442-1]

Approval and Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standard; Colorado

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving the State Implementation Plan (SIP) submission from the State of Colorado to demonstrate that the SIP meets the requirements of Sections 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 Colorado submitted a certification, dated January 7, 2008, that its SIP met these requirements for the 1997 ozone NAAQS. The certification was determined to be complete on March 27, 2008 (73 FR 16205).

DATES: *Effective Date:* This final rule is effective August 22, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2009-0809. 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:

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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.

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I. Background

On July 18, 1997, EPA promulgated 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 a state develops and submits its SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions a 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 to certify that fact via a letter to EPA.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 had 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 particular, EPA found that Colorado had submitted a complete SIP ("Infrastructure SIP") to meet these requirements.

On May 18, 2011, EPA published a notice of proposed rulemaking (NPR) for the State of Colorado (76 FR 28707) to act on the State's Infrastructure SIP for the 1997 ozone NAAQS. Specifically, in the NPR EPA proposed approval of Colorado's SIP as meeting the requirements of all section 110(a)(2) elements with respect to the 1997 ozone NAAQS, aside from elements 110(a)(2)(D)(i), 110(a)(2)(I), and the visibility protection requirement of element 110(a)(2)(J), on which EPA did not propose action.² EPA received a comment on section 110(a)(2)(E)(ii), and EPA is not finalizing today its proposed approval for this sub-element in order to fully respond to that comment.

EPA proposed to approve element 110(a)(2)(C) for the 1997 ozone NAAQS in the event that the State clarified (or modified) its January 7, 2008 certification to ensure consistency with two rules related to regulation of

¹ Memorandum from William T. Harnett, Director, Air Quality Policy Division, "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and PM_{2.5} National Ambient Air Quality Standards" (Oct. 2, 2007).

² See the NPR (76 FR 28707) for further explanation regarding the omission of elements 110(a)(2)(D)(i) and 110(a)(2)(I) from the proposal.

greenhouse gas (GHG) emissions: “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule” (“Tailoring Rule”), 75 FR 31514 (June 3, 2010), and “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). In the PSD SIP Narrowing Rule, EPA withdrew its previous approval of Colorado’s prevention of significant deterioration (PSD) program to the extent that it applied PSD permitting to GHG-emissions increases from GHG-emitting sources below thresholds set in the Tailoring Rule. EPA withdrew its approval on the basis that the State lacked sufficient resources to issue PSD permits to such sources at the statutory thresholds in effect in the previously-approved PSD program. After the PSD SIP Narrowing Rule, the portion of Colorado’s PSD SIP from which EPA withdrew its approval had the status of having been submitted to EPA but not yet acted upon. In its February 1, 2008 certification, Colorado relied on its PSD program as approved at that date—which was before December 30, 2010, the effective date of the PSD SIP Narrowing Rule—to satisfy the requirements of infrastructure element 110(a)(2)(C). Given EPA’s basis for the PSD SIP Narrowing Rule, EPA proposed approval of the Colorado Infrastructure SIP for infrastructure element (C) if either the State clarified (or modified) its certification to make clear that the State relies only on the portion of the PSD program that remains approved after the PSD SIP Narrowing Rule issued on December 30, 2010, and for which the State has sufficient resources to implement, or the State acted to withdraw from EPA consideration the remaining portion of its PSD program submission that would have applied PSD permitting to GHG sources below the Tailoring Rule thresholds. On May 10, 2011, EPA received a letter from Colorado clarifying that the State relies only on the portion of the PSD program that remains approved after the PSD SIP Narrowing Rule issued on December 30, 2010.³

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 PM_{2.5} 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.⁴ 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 at sources, that may be contrary to the CAA and EPA’s policies addressing such excess emissions (“SSM”); 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 new source review programs that may be inconsistent with the requirements of the CAA and EPA’s regulations that pertain to such programs (“minor source new source review (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_{2.5} 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

⁴ 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.

³ Colorado’s May 10, 2011 clarification letter is available in the docket for this action.

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.⁵ 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.⁶

⁵ 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.

⁶ 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

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).⁷ This illustrates that EPA must determine which provisions of section 110(a)(2) may be applicable for a given 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.⁸ 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,

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_x SIP Call; Final Rule," 70 FR 25,162 (May 12, 2005) (defining, among other things, the phrase "contribute significantly to nonattainment").

⁷ See, e.g., *Id.*, 70 FR 25,162, at 63–65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

⁸ 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_{2.5} 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_{2.5} 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.

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.⁹

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_{2.5} NAAQS.¹⁰ Within this

⁹ For example, implementation of the 1997 PM_{2.5} NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

¹⁰ See, "Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-hour Ozone and PM_{2.5} 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_{2.5} NAAQS entitled "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle (PM_{2.5}) National Ambient Air Quality Standards (NAAQS)," from

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.”¹¹ 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.”¹² 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.”¹³ 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_{2.5} NAAQS, EPA gave much more specific recommendations. But for other infrastructure SIP submittals, and for certain elements of the submittals for the 1997 PM_{2.5} 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 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_{2.5} 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.¹⁴ Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.¹⁵ 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.¹⁶

II. Response to Comments

EPA received one letter on June 17, 2011 containing comments from

¹⁴ EPA has recently 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).

¹⁵ EPA has recently 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).

¹⁶ EPA has recently 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 4,540 (Jan. 26, 2011) (final disapproval of such provisions).

William T. Harnett, Director Air Quality Policy Division, to Regional Air Division Directors, Regions I–X, dated September 25, 2009 (the “2009 Guidance”).

¹¹ *Id.*, at page 2.

¹² *Id.*, at attachment A, page 1.

¹³ *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.

WildEarth Guardians (WG), an environmental organization. The significant comments made in WG's June 17, 2011 letter and EPA's responses to those comments are given below.

Comment No. 1: The commenter claimed that Colorado "lacks adequate funding in accordance with CAA section 110(a)(2)(E)(i)." As evidence of this question of sufficient funding, the commenter cited a Colorado Legislative Council (CLC) fiscal note stating that the Colorado Air Pollution Control Division's (APCD) resources are inadequate to process all of the approximately 2,500 to 3,000 air permit applications the State receives annually, causing a backlog of approximately 1,200 unprocessed permits as of April 2011. The commenter argued that this indicates Colorado lacks adequate resources to implement its SIP (in particular, permitting programs) and that the SIP is therefore deficient with respect to section 110(a)(2)(E)(i).

The commenter attributed APCD's lack of adequate resources to the State charging Title V permit applicants permit fees "far below the minimum requirements under Title V." The commenter described the fees charged by the State and compared them to amounts in an EPA memorandum discussing the presumptive minimum fee for 40 CFR part 70 (title V) programs. Although the commenter noted that the State does charge a variety of fees in connection with the title V program, the commenter argued that there is no indication that the fees charged by the State, in aggregate, meet the presumptive minimum fee.

Finally, the commenter used the same arguments to claim EPA does not have an adequate basis to approve Colorado's SIP for the requirements of CAA section 110(a)(2)(L).

EPA Response: EPA disagrees with the commenter's conclusions concerning the adequacy of the Colorado infrastructure SIP with respect to both section 110(a)(2)(E)(i) and (L). First, with regard to the reported statement by the CLC, EPA notes that the commenter in a number of places referred to this as a statement by "Colorado" as though the CLC is the equivalent of the State. However, the cited document is an analysis by the CLC staff of a Colorado Senate bill. The CLC staff is a nonpartisan research arm of the State Assembly; in other words, the CLC staff is part of the legislative branch of the State government. EPA has no reason to question the conclusions of the CLC, but those conclusions are not the equivalent of an official statement by the State itself with

respect to the issue relevant in this action.

On the other hand, Colorado's infrastructure SIP certification that is before EPA for approval was submitted by the director of the Colorado Department of Public Health and Environment (CDPHE), an executive branch agency that includes the Colorado APCD. EPA considers the submission to have come from the organization within the State that is the best judge of the overall resources available for implementation of the SIP. In its certification, CDPHE discussed the budget and staff of the APCD and indicated that both were sufficient to carry out Colorado's SIP. Section 110(a)(2)(E) requires that the SIP provide (among other things) necessary assurances that the State have adequate personnel and funding to carry out the SIP. EPA concludes that the certification provides these necessary assurances.

In addition, EPA notes that the CLC statements cited by the commenter speak only to the resources available to process permits. Based on the information provided by the commenter, the backlog would appear to amount to a delay of approximately 5–6 months for a permit. While delays are very problematic, such delays are not evidence of an inability to implement the requirements of the SIP at all. Moreover, the CLC staff analysis noted that the purpose of the bill is to address the backlog; the bill does so by providing for APCD-approved third party contractors to perform modeling for sources not subject to PSD. The bill was signed into law by the Governor of Colorado on June 9, 2011. EPA therefore disagrees with the commenter's conclusion that EPA cannot approve Colorado's infrastructure SIP for section 110(a)(2)(E)(i) on the basis of the statement in the CLC staff analysis.

Turning to fees charged by Colorado under its title V program, EPA notes that, in general, title V programs are not part of the SIP.¹⁷ Thus, such programs are not part of the requirements of section 110(a)(2). Furthermore, section 502(b)(3) of the Act requires not only that title V program fees cover the reasonable direct and indirect costs of developing and administering the title V program, but also requires that the fees be used *only* to cover those costs. EPA therefore disagrees with the comment

that the alleged flaws in the title V program with respect to the amount of fees charged by the State prevent EPA from approving the Colorado infrastructure SIP for the 1997 ozone NAAQS for element 110(a)(2)(E)(i). The State provided evidence that its overall budget is sufficient to carry out its obligations and the issue raised by the commenter does not refute that overall budget.

EPA also disagrees with the commenter's argument that the amount of fees charged by the State in its title V program renders the infrastructure SIP unapprovable with respect to section 110(a)(2)(L). As stated in the text of the section, 110(a)(2)(L) is no longer applicable to title V operating permit programs after approval of such programs. As noted in the NPR, 76 FR at 28714, final approval of Colorado's title V operating permit program became effective October 16, 2000 (65 FR 49919). EPA therefore disagrees with the comment that EPA cannot approve Colorado's infrastructure SIP for section 110(a)(2)(L) on the basis of alleged flaws in Colorado's title V program.

Comment No. 2: The commenter argued that Colorado's SIP fails to meet the PSD requirements of section 110(a)(2)(J) due to a lack of ozone impact analysis for new or modified major sources. The commenter alleged a number of specific inadequacies, which EPA discusses separately below.

Comment 2.a: The commenter asserted that the SIP does not require the APCD to ensure that a new or modified source does not cause or contribute to violations of the ozone NAAQS prior to issuance. The commenter cited section 165(a)(3) of the Act and quoted the language of 40 CFR 51.166(k)(1). The commenter later stated that nothing in the Colorado SIP explicitly requires that ozone impacts be addressed in the context of issuing a PSD permit.

EPA Response: EPA disagrees with the commenter's interpretation of the Colorado SIP. Section VI.A.2 of part D of Regulation Number 3 in the Colorado SIP, applicable to sources subject to PSD, specifically requires a source impact analysis.¹⁸ The language of section VI.A.2 mirrors the language in 40 CFR 51.166(k)(1) quoted by the commenter. In addition, there is nothing

¹⁷ In the case of Colorado, the Title V program is not part of the SIP, with the exception of the fee program. Section 110(a)(2)(E)(i) requires adequate resources to carry out the SIP. As the Title V program—except the fee program itself—is not part of the SIP, 110(a)(2)(E)(i) does not require an assessment of whether the fees are adequate to implement the Title V program in its entirety.

¹⁸ This provision was previously in part B of Regulation Number 3. On May 31, 2011, Region 8 finalized an action that (among other things) approved Colorado's reorganization of its PSD program into the new part D of Regulation Number 3. The notice of the final action has not yet been published in the **Federal Register**, but a copy of Colorado's submittal and the signed notice can be found in Docket No. [xxx].

in this section or any other section of the SIP that exempts sources from carrying out the source impact analysis for the 1997 ozone NAAQS. Nor does the commenter cite any provision of the SIP that creates such an exemption. EPA concludes that the commenter is therefore in error in stating that the Colorado SIP does not require the source impact analysis set out in 40 CFR 51.166(k)(1). Furthermore, section VI.A.2 requires the owner or operator of the proposed new source or modification to demonstrate that the construction or modification of the source will not cause or contribute to a violation of any NAAQS. Such language includes the 1997 8-hour ozone NAAQS; thus the commenter is also in error in stating that the SIP does not specifically require ozone impacts to be addressed.

Comment 2.b: The commenter stated that the SIP is deficient because it does not identify any significant impact levels for ozone.

EPA Response: EPA has not identified significant impact levels (SILs) for ozone.¹⁹ The comment therefore does not provide any basis for EPA to change its proposed approval of the Colorado infrastructure SIP for section 110(a)(2)(C) or (J) for the 1997 ozone NAAQS.

Comment 2.c: The commenter asserted that section VI.A.3.e of Part D of Regulation Number 3 “explicitly allows the owner or operator of a proposed major source or major modification to forego a pre-construction ozone analysis altogether.”

EPA Response: EPA disagrees with the commenter’s characterization of the Colorado SIP. First, EPA notes that section VI.A.3.e (and the parallel provision in 40 CFR 51.166(m)(1)(v)) applies only if a proposed major stationary source or major modification of volatile organic compounds (VOCs) meets the requirements of 40 CFR part 51, Appendix S, Section IV, including, in particular, the requirement to satisfy the lowest achievable emissions rate (LAER) for VOCs. Second, the commenter appears to misunderstand the scope of this provision. Contrary to the commenter’s assertion, the provision does not exempt any sources from the requirement to perform the source impact analysis in section VI.A.2 (discussed in the response to comment 2.a above). Instead, the provision allows sources that (among other things) employ LAER for VOCs to use post-construction monitoring to replace the

pre-application air quality analysis requirements of section VI.A.3.a. This option is specifically provided for in 40 CFR 51.166(m)(1)(v).

Comment 2.d: The commenter alleged that the SIP does not meet the requirements of 40 CFR 51.166(l)(1), which requires the SIP to base applications of air quality modeling in PSD permitting on the applicable models, data bases, and other requirements specified in Appendix W of 40 CFR part 51, and requires modification and substitution of such models to be approved by the Administrator. The commenter also asserted that the Colorado SIP does not specify any approved methodology for analyzing ozone impacts, contrary to PSD requirements under the CAA.

EPA Response: EPA disagrees with the commenter’s reading of the requirements of the Colorado SIP. The Colorado SIP includes section VIII.A of part A of Regulation Number 3, which specifically requires estimates of ambient air concentrations required under Regulation Number 3 to be based on applicable models, data bases, and other requirements generally required by the EPA. Although section VIII.A does not specifically reference Appendix W, in the context of the source impact analysis in section VI.A.2 for PSD permitting, we interpret this language to include the requirements specified in Appendix W. In addition, section VIII.A requires any modification or substitution of a model to be subject to public notice and comment and to be approved in writing by EPA (which we interpret to mean the Administrator or her delegate). EPA therefore disagrees with the comment that the Colorado SIP does not meet the requirements of 40 CFR 51.166(l)(1). Furthermore, the comment implies that the Colorado SIP must specify an approved methodology for analyzing ozone impacts, but did not explain what provision creates such a requirement for the Colorado SIP. EPA therefore disagrees with the comment that the Colorado SIP is contrary to PSD requirements under the Act.

Comment 2.e: The commenter stated that the APCD has not interpreted its SIP to require an analysis of ozone impacts. As evidence, the commenter quoted the following statement in APCD’s modeling guidance: “ozone modeling is not routinely requested for construction permits, although it could be in unusual cases such as situations where the Division believes ozone standards could realistically be violated by the proposed source or modification.”

EPA Response: EPA disagrees with the commenter’s characterization of

APCD’s position. EPA first notes that the quoted language is in the chapter of the APCD modeling guidance regarding the demonstration to be made for construction permits for *minor* sources. While the relevant chapter of the APCD modeling guidance (regarding new major stationary sources and major modifications) does refer to the minor source chapter, it is not clear that the statement in the minor source chapter about the frequency of requests for ozone modeling applies to sources subject to PSD. Furthermore, the modeling guidance elsewhere states (see pages 7–9) that a source impact analysis (as discussed in the response to comment 2.a above and as required by the SIP) must be performed for sources subject to PSD.

As discussed above in the response to comment 2.d, the Colorado SIP requires estimates of ambient air concentrations to be based on the applicable models, data bases, and other requirements generally required by the EPA, which EPA interprets to include the requirements of Appendix W of 40 CFR part 51, Guideline on Air Quality Models. Section 5.2.1 of Appendix W includes the Guideline recommendations for models to be utilized in assessing ambient air quality impacts for ozone. Section 5.2.1.c provides that the model users (state and local permitting authorities and permitting applicants) should work with the appropriate EPA Regional Office on a case-by-case basis to determine an adequate method for performing an air quality analysis for assessing ozone impacts. Due to the complexity of modeling ozone and the dependency on the regional characteristics of atmospheric conditions, this is an appropriate approach for assessing ozone impacts rather than specifying one particular preferred model nationwide, which may not be appropriate in all circumstances. Instead, the choice of method “depends on the nature of the source and its emissions. Thus, model users should consult with the Regional Office * * *” Appendix W Section 5.2.1.c. Therefore, it is appropriate for permitting authorities to consult and work with EPA Regional Offices as described in Appendix W, including section 3.0.b and c, 3.2.2, and 3.3, to determine the appropriate approach to assess ozone impacts as required for sources subject to PSD. Although EPA has not selected one particular preferred model in Appendix A to Appendix W (Summaries of Preferred Air Quality Models) for conducting ozone impact analyses for individual sources, state/

¹⁹For an explanation and discussion of SILs, in the context of PM_{2.5}, see 75 FR 64864 (Oct. 20, 2010).

local permitting authorities must comply with the appropriate PSD Federal Implementation Plan (FIP) or SIP requirements with respect to ozone.

EPA has had a standard approach in its PSD SIP and FIP rules of not mandating the use of a particular model for all circumstances, instead treating the choice of a particular method for analyzing ozone impacts as circumstance-dependent. EPA then determines whether the State's implementation plan revision submittal meets the PSD SIP requirements. As explained above, in this case the Colorado SIP meets the requirements of 40 CFR part 51.166(k) and (l).

III. Final Action

In this action, EPA is approving in full the following section 110(a)(2) infrastructure elements for Colorado for the 1997 ozone NAAQS: (A), (B), (C), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J), (K), (L), and (M). EPA is taking no action today on section 110(a)(2)(E)(ii) for the 1997 ozone NAAQS. EPA will address this sub-element in a later action.

IV. 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 USC 7410(k), 40 CFR 52.02(a)). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves some state law as meeting Federal requirements and disapproves other state law because it does not meet Federal requirements; this action does not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

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 September 20, 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.

Dated: June 30, 2011.

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 G—Colorado

- 2. Section 52.353 is added to read as follows:

§ 52.353 Section 110(a)(2) infrastructure requirements.

On January 7, 2008 James B. Martin, Executive Director of the Colorado Department of Public Health and Environment for the State of Colorado, submitted a certification letter which provides the State of Colorado's SIP provisions which meet the requirements of CAA Section 110(a)(1) and (2) relevant to the 1997 Ozone NAAQS.

[FR Doc. 2011-18421 Filed 7-21-11; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2010-0301; FRL-9441-6]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving the State Implementation Plan (SIP) submission from the State of South Dakota to demonstrate that the SIP meets the requirements of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for ozone on July 18, 1997. 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". The State of South Dakota