Attachment 1

The United States Environmental Protection Agency's Memorandums and Notices used in Developing the North Carolina Certification for Clean Air Act Section 110(a)(1) and (2) 2010 1-hour Nitrogen Dioxide Standard

(This page intentionally left blank)

This document contains the United States Environmental Protection Agency's (USEPA's) memorandums and notices used in developing the North Carolina Certification for Clean Air Act Section 110(a)(1) and (2) requirements for the 2010 1-hour nitrogen dioxide national ambient air quality standards. Below is a table of contents of the reference documents used.

(This page intentionally left blank)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

MEMORANDUM

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

SUBJECT: Guidance on Infrastructure State Implementation Plan (SIP) Elements Required Under Sections 110(a)(1) and 110(a)(2) for the 2008 Lead (Pb) National Ambient Air Quality Standards (NAAQS)

FROM: Stephen D. Page, Director
Office of Air Quality Planning and Standards

TO: Regional Air Division Directors, Regions 1 – 10

This guidance addresses the "infrastructure" elements for SIPs to meet the requirements of sections 110(a)(1) and 110(a)(2) of the Clean Air Act (CAA) for the 2008 Pb NAAQS. On October 15, 2008, the U. S. Environmental Protection Agency (EPA) revised the primary and secondary Pb NAAQS from 1.5 micrograms per cubic meter ($\mu g/m^3$) to 0.15 $\mu g/m^3$. Pursuant to sections 110(a)(1) and 110(a)(2) of the CAA, each state is required to develop and submit a plan to provide for the implementation, maintenance, and enforcement of a newly promulgated or revised NAAQS.

The CAA directs states to address basic air quality management infrastructure requirements to ensure attainment and maintenance of the NAAQS. The attachment to this memorandum summarizes each of these requirements. The CAA provides that states are to submit to EPA SIPs addressing the requirements of sections 110(a)(1) and 110(a)(2) within three years of promulgation of a new or revised standard.[1] The EPA recognizes that many of the required section 110(a)(2) elements relate to the general information and authorities that constitute the infrastructure of a state's air quality management program – elements that have been in place since the initial SIPs were submitted in response to the Clean Air Act of 1970 and some required elements may have been adopted to satisfy the infrastructure SIP requirements for the 1997 $PM_{2.5}$, 1997 8-hour ozone, and 2006 $PM_{2.5}$ NAAQS. It is the responsibility of each state to review its air quality management program's infrastructure SIP provisions in light of each new or revised NAAQS.

Determining Completeness of State Submittals

Pursuant to section 110(a)(1), states will have to review and revise, as appropriate, their existing Pb NAAQS SIPs to ensure that the SIPs are adequate to address the 2008 Pb NAAQS. States

[1] Although the effective date of the Federal Register notice for the final rule was January 12, 2009, the rule was signed by the Administrator and publicly disseminated on October 15, 2008. Therefore, the deadline for submittal of infrastructure SIPs for the 2008 Pb NAAQS is October 15, 2011.

should, in consultation with the EPA Regional Offices, refer to applicable EPA regulations governing SIP submittals per 40 CFR Part 51.

These regulations include, but are not limited to:

- Subpart I – Review of New Sources and Modifications
- Subpart J – Ambient Air Quality Surveillance
- Subpart K – Source Surveillance
- Subpart L – Legal Authority
- Subpart M – Intergovernmental Consultation
- Subpart O – Miscellaneous Plan Content Requirements
- Subpart P – Protection of Visibility
- Subpart Q – Reports.

If a state determines that its existing SIP is adequate, then the state's SIP submittal may be a certification that the existing SIP contains provisions addressing all requirements of the section 110(a)(2) infrastructure elements as applicable for the 2008 Pb NAAQS. Such certification (*e.g.*, in the form of a letter to the EPA from the Governor or her/his designee) should cite the applicable provisions in the existing SIP. As for all SIP submittals, section 110(l) directs the state to provide reasonable public notice and opportunity for public hearing on a certification letter prior to submission to the EPA.

- Section 110(a)(2) specifies the elements and sub-elements that are required in order for the EPA to determine that an infrastructure SIP submittal is complete. Specifically, each state should include documentation demonstrating a correlation between each infrastructure element and an equivalent state statutory or regulatory authority in the existing or submitted SIP. At a minimum, a complete submittal is a letter from an appropriate state official (*e.g.*, Governor or designee) certifying compliance with each element which has gone through state notice and hearing procedures. To meet the requirements of sections 110(a)(1) and 110(a)(2), a SIP submittal should include a detailed explanation of how the state's SIP meets each applicable requirement of section 110(a)(2). Where a SIP submittal does not meet the requirements of those CAA provisions, a letter should be sent to the state notifying it of the finding of incompleteness. EPA's criteria for determining the completeness of a SIP submittal are set out in EPA's regulations at 40 CFR Part 51, Appendix V. A state's obligation to make an infrastructure SIP submittal that addresses one or more infrastructure SIP elements cannot be fulfilled through a letter from the state that merely promises a future submittal.

EPA has determined that the elements and sub-elements of section 110(a)(2) with respect to the 2008 Pb NAAQS are, for the most part, severable. For example:

- SIP submittals that address some but not all elements or sub-elements of section 110(a)(2) should be found incomplete for the unaddressed elements or sub-elements.

- If EPA makes a finding of failure to submit an infrastructure SIP, that finding will only apply to the elements or sub-elements that were not addressed by the state's

infrastructure SIP revision. In order for EPA to make a determination as to whether a subsequent infrastructure SIP submittal is complete, the state only needs to submit those elements that were earlier found not to have been submitted.

A finding that an infrastructure SIP submittal is complete does not necessarily mean that the submittal is approvable, because the completeness review only addresses whether the state has provided information sufficient to warrant formal EPA review for approvability. Section 110(k) directs EPA to take final action on a SIP submittal within one year after the SIP is determined to be complete. If EPA makes an affirmative finding that a SIP submittal is complete, the date of the finding establishes the "completeness date" for the submittal; if EPA makes no finding the submittal is deemed complete, by operation of law, on the date six months after the submittal date. Actions on a SIP submittal may include approval (full, partial, or conditional) and disapproval (full or partial).

The obligations of EPA to promulgate a federal implementation plan (FIP) are set out in section 110(c) of the CAA. EPA's obligation to promulgate a FIP for a state is triggered if EPA takes any of the following actions associated with the required SIP: 1) EPA makes a finding that a state has failed to make a SIP submittal; 2) EPA makes a finding that a state has made an incomplete submittal; or 3) EPA disapproves a SIP submittal. If EPA takes one of these actions, section 110(c) directs EPA to take further action within two years, under what is commonly referred to as the "FIP clock." In order to remove EPA from the FIP obligation, a state SIP submittal must meet the applicable requirements and be approved by EPA.

We acknowledge that there have been significant delays in issuing this guidance. This is due in part to legal and other issues raised by outside parties over the past two years regarding actions on a range of infrastructure SIP issues for other pollutants. It was our desire to address as many of those issues as possible in this memorandum. We recognize that many states have been moving forward to develop these infrastructure plans, and this guidance is intended to help them complete this process. We will work to assist states in the development and completion of these plans so they may be submitted as soon as possible.

Please ensure that the appropriate air agency officials for states in your Region are made aware of this guidance.

For Further Information

If you have any questions concerning this guidance, please contact Mia South at (919) 541-5550 or by email at south.mia@epa.gov, or Lisa Sutton at (919) 541-3450 or by email at sutton.lisa@epa.gov.

Attachment

cc: Anna Marie Wood
Scott Mathias
Rich Damberg
Kevin McLean
Sara Schneeberg
Geoffrey Wilcox
David Orlin

Attachment

Guidance on Section 110 Infrastructure SIPs for the 2008 Pb NAAQS

Table of Contents

Attachment

Required Section 110 Infrastructure SIP Elements

The Clean Air Act (CAA) directs states to address basic State Implementation Plan (SIP) requirements to implement, maintain and enforce the national ambient air quality standards (NAAQS). Under CAA sections 110(a)(1) and 110(a)(2), states are to submit these SIPs within three years after promulgation of a new or revised standard. Many of the section 110(a)(2) SIP elements relate to the general information and authorities that constitute the "infrastructure" of a state's air quality management program, and these have been in place since the initial SIPs were submitted in response to the 1970 CAA. It is the responsibility of each state to review its air quality management program's infrastructure SIP provisions in light of each new or revised NAAQS.

States should review and revise, as appropriate, their existing infrastructure SIPs to ensure that they are adequate to address the 2008 Pb NAAQS. States should, in consultation with U. S. Environmental Protection Agency (EPA) Regional Offices, follow applicable EPA regulations governing infrastructure SIP submittals in 40 CFR Part 51 - e.g., Subpart I ("Review of New Sources and Modifications"), Subpart J (Ambient Air Quality Surveillance), Subpart K (Source Surveillance), Subpart L (Legal Authority), Subpart M ("Intergovernmental Consultation"), Subpart O (Miscellaneous Plan Content Requirements), Subpart P ("Protection of Visibility"), and Subpart Q ("Reports").

For many infrastructure SIP elements, a SIP submittal should refer to and include citations to relevant state regulations. See guidance below regarding elements (F), (H), (J), and (M). For EPA's general criteria for infrastructure SIP submittals, refer to 40 CFR Part 51, Appendix V, "Criteria for Determining the Completeness of Plan Submissions."

For example, in accordance with Appendix V, paragraph 2.1(d), an infrastructure SIP submittal would include a copy of the actual regulation that the state is submitting for approval and incorporation by reference into its SIP, if a copy of that regulation has not already been provided by the state.

Pursuant to section 110(a), states must provide reasonable notice and opportunity for public hearing for all infrastructure SIP submittals. Pursuant to EPA's regulations at 40 CFR Part 51, an infrastructure SIP submittal will include a certification by the state that the public hearing was held in accordance with EPA's procedural requirements for public hearings. See 40 CFR Part 51 Appendix V 2.1(g) and 40 CFR 51.102. If a state believes that its existing approved infrastructure SIP is adequate with regard to specific elements, then the state's SIP submission may be a certification that the existing SIP contains provisions addressing the relevant section 110(a)(2) infrastructure elements as applicable for

the 2008 Pb NAAQS. Such certification (*e.g.*, in the form of a letter to EPA from the Governor or her/his designee) should cite the applicable provisions in the existing infrastructure SIP and provide a specific description of how compliance with each element is achieved. A state's certification made in connection with the 2008 Pb NAAQS should be included in a SIP submittal only after the state has provided public notice and opportunity for public hearing on its certification.

Section 110(a)(2) of the CAA directs all states to develop and maintain an air quality management infrastructure that includes enforceable emission limitations, an ambient monitoring program, an enforcement program, air quality modeling capabilities, and adequate personnel, resources, and legal authority. Section 110(a)(2)(D) also directs SIPs to prevent emissions from within the state that contribute significantly to nonattainment in any other state, or that interfere with maintenance in any other state, or that interfere with programs under part C of the CAA to prevent significant deterioration of air quality or to protect visibility in any other state.

Two elements identified in section 110(a)(2) are not governed by the 3-year submission deadline of section 110(a)(1). The elements pertain to part D, in Title I of the CAA, which addresses plan requirements for nonattainment areas. Therefore, the following section 110(a)(2) elements are considered by EPA to be outside the scope of infrastructure SIP actions: (1) section 110(a)(2)(C) to the extent it refers to permit programs (known as "nonattainment new source review") under part D; and (2) section 110(a)(2)(I) in its entirety. EPA does not expect infrastructure SIP submittals to include regulations or emission limits developed specifically for attaining the relevant standard. Those submittals are due at the time the nonattainment area planning elements are due (18 months following designation).

Except as described above, subsections (A) through (M) of section 110(a)(2) set forth the infrastructure elements that a SIP should address, in order to be approved by EPA. The elements are presented below in context of the 2008 Pb NAAQS.

Section 110(a)(2)(A): Emission limits and other control measures

"Each such plan shall [. . .] include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter."

EPA would not expect infrastructure SIP submission to identify nonattainment area emission controls. Emissions limitations and other control measures to attain the 2008 NAAQS in areas designated nonattainment for the 2008 Pb NAAQS are due on a different schedule from the section 110 infrastructure elements and will be reviewed and acted upon through a separate process. However, the infrastructure SIP submission may include a list or table referencing any Pb emission reduction measures adopted and relied on by the state to meet other CAA requirements, such as maintenance of the 2008 NAAQS.

There are two other issues that generally fall under this particular element of section 110(a)(2)(A) for which we provide general guidance at this time. They are: (1) how states would need to address previously approved emissions limitations that may treat startup, shutdown and malfunction (SSM) events inconsistently with our longstanding guidance on excess emissions; and (2) how states would need to address previously approved variance provisions and "director's discretion" provisions that do not comport with EPA policy. We are discussing options for resolving next steps to be taken on these issues, taking into consideration several actions on state provisions relating to SSM and director's discretion in which EPA is currently engaged.[1]

Nevertheless, in the meantime EPA wishes to provide infrastructure SIP guidance to the extent possible. Therefore, as general guidance, EPA can advise that states not make infrastructure SIP submissions that rely on previously approved but potentially flawed provisions. Further, we wish to make clear that for infrastructure SIP submissions such as for the 2008 Pb NAAQS, any "new" (*i.e.*, not already SIP-approved) provisions should be consistent with EPA's longstanding policies on SSM and director's discretion, which are briefly summarized as follows.[2] Because excess emissions might aggravate air quality so as to prevent attainment and maintenance of the NAAQS and compliance with other CAA requirements, EPA would view all periods of excess emissions as violations of the applicable emission limitation. Therefore, new provisions as part of an approvable SIP submittal could not exempt from enforcement excess emissions that may occur at a facility during a period of startup or shutdown. Further,

---

[1] See, *e.g.*, SIPs for Utah and North Dakota. EPA has also proposed to enter into a settlement agreement that would obligate EPA to respond by August 31, 2012, to a petition for rulemaking filed by the Sierra Club that concerns SSM provisions in 39 states' SIPs. (See notice published in the Federal Register on September 1, 2011, at 76 FR 54465.)

[2] For further description of EPA's policy on SSM and director's discretion, see, *e.g.*, a memorandum dated September 20, 1999, entitled, "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation.

new provisions as part of an approvable SIP submittal could not automatically exempt from enforcement excess emissions claimed to result from an equipment malfunction. In addition, new provisions as part of an approvable SIP submittal could not allow a state air director the discretion to determine whether an instance of excess emissions is a violation of an emission limitation, because such a determination could bar EPA and citizens from enforcing applicable requirements.

Section 110(a)(2)(B): Ambient air quality monitoring/data system

"Each such plan shall [. . .] provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator."

To meet section 110(a)(2)(B) requirements for this NAAQS, the state's monitoring system should:

- Monitor air quality for Pb at appropriate locations throughout the state using EPA approved Federal Reference Method or equivalent monitors, in accordance with recent revisions to the Pb monitoring network requirements. See the Lead Ambient Air Monitoring Requirements, December 14, 2010.
- Submit data to EPA's Air Quality System (AQS) in a timely manner in accordance with EPA's Air Quality data reporting regulations. See 40 CFR 51.320.
- Submit approvable annual monitoring plans to EPA that describe how the state has complied with monitoring requirements and explain any proposed changes to the network.
- Provide the EPA Regional Office prior notification of any planned changes to monitoring sites or to the network plan.

Section 110(a)(2)(C): Programs for enforcement, PSD, and NSR

"Each such plan shall [. . .] include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter."

The Prevention of Significant Deterioration (PSD) and nonattainment New Source Review (NNSR) programs contained in parts C and D of Title I of the CAA, and collectively referred to as the major New Source Review (NSR) program, govern preconstruction review and permitting of any new or modified major stationary sources of air pollutants regulated under the CAA as well as any precursors to the formation of that pollutant when identified for regulation by the Administrator.[3] The EPA rules addressing these programs can be found generally at 40 CFR 51.166 and 40 CFR 52.21 (for PSD), and 40 CFR 51.165, 40 CFR 52.24, and Part 51, Appendix S (for NNSR).

Essential to the approvability of infrastructure SIP elements (C) and (J) is the approvability of a state's PSD program in its entirety. To meet section 110(a)(2)(C) requirements for the Pb NAAQS, the infrastructure SIP submittal should:

- Reference relevant state and federal regulations that provide for enforcement of Pb emission limits and control measures.
- Identify the various state regulations that govern permitting of new and modified stationary sources (minor and major) of Pb in the state.
- Incorporate its PSD program regulations to address any applicable EPA amendments to Pb PSD rules within 3 years from the date of such amendments.

For areas subject to a state's SIP-approved PSD program, the state should demonstrate that it is authorized to implement its existing PSD permit program to ensure that the construction and modification of major stationary sources does not cause or contribute to a violation of the Pb NAAQS. The state's PSD program should ensure that new or modified sources will apply the Best Available Control Technology to reduce Pb emissions in accordance with CAA sections 165 (a)(3) and (4).

[3] The terms "major" and "minor" categorize a stationary source, for NSR applicability purposes, in terms of an annual emissions rate (tons per year, tpy) for a pollutant. Generally, a minor source is any source that is not "major." "Major" is defined in the applicable NSR regulations—PSD or nonattainment NSR.

States need to have in place a PSD program that applies to all regulated NSR pollutants, including GHG. The state's PSD program should apply to sources that emit greenhouse gases (GHG) in accordance with EPA's Tailoring Rule.[4] Among other things, the state's PSD program must either: (i) limit PSD applicability to GHG-emitting sources by adopting the applicability thresholds included in the Tailoring Rule; or (ii) adopt lower GHG thresholds and show that the state has adequate personnel and funding to administer and implement those lower thresholds. Otherwise, the state is directed to remove from EPA's consideration for approval that portion of the SIP (or SIP submission) for which EPA rescinded our previous approval of the PSD program (in a rulemaking referred to as the "GHG PSD SIP Narrowing Rule").[5] To request such removal, a state may choose to follow the example of the letter request submitted by South Carolina.[6]

Until a state has adopted a comprehensive program, its infrastructure SIP would not be approvable with respect to CAA Section 110(a)(2)(C) or (J). If a state lacks a SIP-approved PSD program, it is subject to a federal implementation plan (FIP), and major stationary sources within its jurisdiction are subject to the federal PSD requirements in 40 CFR 52.21. Some states are subject to a FIP for PSD permitting of all regulated NSR pollutants, and fewer states are subject to a FIP for PSD permitting that is limited to GHG. For sources subject to a FIP for PSD permitting, either the EPA Regional Office or the state acting as EPA's delegate is the permitting authority. EPA recognizes that many states have been implementing a PSD FIP program for some time. When a state is already subject to a FIP for PSD permitting (whether or not the state has been delegated authority to implement the PSD FIP), and EPA disapproves this element of the state's infrastructure SIP submittal, we expect the permitting authority would simply continue implementation of the PSD FIP, and EPA would have no additional FIP obligations. In addition, the state would not be subject to any potential mandatory sanctions in connection with such disapproval, as such sanctions do not apply to infrastructure SIP deficiencies.

Minor NSR programs are subject to the statutory requirements in section 110(a)(2)(C) of the CAA which requires "…regulation of the modification and construction of any stationary source …as

---

[4] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule. 75 FR 31514 (June 3, 2010).
[5] Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas-Emitting Sources in State Implementation Plans; Final Rule, 75 FR 82536 (December 30, 2010).
[6] South Carolina's letter request can be found at http://www.regulations.gov, at EPA-R04-OAR-2010-0721-0006.

necessary to assure that the [NAAQS] are achieved." These programs should be established in each state within three years of the promulgation of a new or revised NAAQS, and may be particularly important because virtually all sources of lead are minor sources.

To date, EPA has not proposed to amend the PSD regulations with regard to the Pb NAAQS. EPA does recognize that certain provisions of these regulations still may need to be evaluated and potentially revised in light of the 2008 Pb NAAQS. See for example, provisions 40 CFR Part 51.166(i)(5)(i)(g) ("the emissions increase of the pollutant from a new stationary source or the net emissions increase of the pollutant from a modification would cause, in any area, air quality impacts less than the following amounts: … Lead—0.1 µg/m_3, 3-month average);" 40 CFR 166 (b)(23)(i)

("Significant means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates: … Lead: 0.6 tpy"). EPA also is planning to issue Pb modeling guidance to supplement the guidance contained in EPA's Guideline on Air Quality Models (40 CFR Part 51, Appendix S), which will assist states and prospective sources in carrying out the analyses necessary to satisfy the PSD requirements for Pb.

Section 110(a)(2)(D)(i): Interstate transport provisions

"Each such plan shall […] contain adequate provisions:

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will-

(ii) contribute significantly to nonattainment in, or

(iii) interfere with maintenance by, any other state with respect to any such national primary or secondary ambient air quality standard, or interfere with measures required to be included in the applicable implementation plan for any other state under part C of this subchapter to prevent significant deterioration of air quality to protect visibility."

Section 110(a)(2)(D)(i) provides for infrastructure SIPs to include provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment, or interfering with maintenance, of the NAAQS in another state. (The preceding requirements, from subsection (2)(D)(i)(I), respectively refer to what may be called prongs 1 and 2.) Further, this section

directs infrastructure SIPs to include provisions prohibiting any source or other type of emissions activity in one state from interfering with measures required to prevent significant deterioration of air quality, or from interfering with measures required to protect visibility (*i.e.*, measures to address regional haze) in any state. (The preceding requirements, from subsection (2)(D)(i)(II), respectively refer to what may be called prongs 3 and 4.)

The physical properties of Pb prevent Pb emissions from experiencing the same travel or formation phenomena as $PM_{2.5}$ or ozone. More specifically, there is a sharp decrease in Pb concentrations, at least in the coarse fraction, as the distance from a Pb source increases. Accordingly, while it may be possible for a source in a state to emit Pb in a location and in quantities that may contribute significantly to nonattainment in, or interfere with maintenance by, any other state, EPA anticipates that this would be a rare situation, e.g., where large sources are in close proximity to state boundaries.

EPA believes that requirements of subsection (2)(D)(i)(I) (prongs 1 and 2) could be satisfied through a state's assessment as to whether or not emissions from Pb sources located in close proximity to their state borders have emissions that impact the neighboring state such that they contribute significantly to nonattainment or interfere with maintenance in that state.[7] The states' conclusions could be supported by the technical information or data used to support the initial area designations for Pb. Therefore, to address prongs 1 and 2 of section 110(a)(2)(D)(i)(I) the state's submission should include an explanation in support of the state's conclusion and, if applicable, should address the impact in their submittal.

Under section 110(a)(2)(D)(i)(II), the PSD sub-element (prong 3) may be met by the state's confirmation in an infrastructure SIP submission that new major sources and major modifications in the state are subject to PSD and (if the state contains a nonattainment area for the relevant pollutant) NNSR programs that implement the 2008 Pb NAAQS.[8]

With regard to the requirement of prong 4, *i.e.*, visibility under subsection (2)(D)(i)(II), significant impacts from Pb emissions from stationary sources are expected to be limited to short distances from the source and most, if not all Pb stationary sources are located at distances from Class I

[7] For example, EPA's experience with initial lead designations suggests that sources that emit less than 0.5 tpy or that are located more than 2 miles from a state border generally appear unlikely to contribute significantly to nonattainment in another state.

[8] Memorandum issued by William T. Harnett, Director, OAQPS/AQPD, "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)," dated September 25, 2009.

areas such that visibility impacts would be negligible. Although Pb can be a component of coarse and fine particles, Pb generally comprises a small fraction of coarse and fine particles. Furthermore, when evaluating the extent that Pb could impact visibility, Pb-related visibility impacts were found to be insignificant (e.g., less than 0.10%) .[9] Although we anticipate that Pb emissions will contribute only negligibly to visibility impairment at Class I areas, the state's submission should include an explanation in support of the state's conclusion (and, if applicable, should address the impact in their submittal). Where a state's regional haze SIP has been approved as meeting all current obligations, a state may point to its approved plan to demonstrate that it meets the requirements of prong 4.

Section 110(a)(2)(D)(ii): Interstate and International transport provisions

"Each such plan shall [. . .] contain adequate provisions insuring compliance with the applicable requirements of sections 115 or 126 (b) that involve Pb emissions (relating to interstate and international pollution abatement)."

Section 126(a) of the CAA directs each SIP to include provisions requiring a new or modified source to notify neighboring states of potential impacts from the source. States with SIP-approved PSD programs should have a regulatory provision in place, consistent with 40 CFR 51.166(q)(2)(iv), that requires such notification of other state and local agencies. States relying on the federal program requirements of 40 CFR 52.21(q), which provide for notification of affected state and local air agencies, to satisfy this requirement have programs that are technically deficient and not approvable. Although these programs are deficient and these states have not "submitted" anything to EPA, EPA would not be required to take further action with respect to this element because the federal rules represent a FIP that fully addresses the notification issue. In addition, mandatory sanctions would not apply because the deficiencies are neither with regard to a required submittal under part D nor in response to an SIP call under CAA Section 110(k)(5). As described in this infrastructure SIP guidance for element (C), such states remain obligated to adopt and submit a PSD program for EPA approval that applies to all regulated NSR pollutants, including GHG. Until a state provides such a program, its infrastructure SIP would not be approvable with respect to section 110(a)(2)(D)(ii).

[9] Analysis by Mark Schmidt, OAQPS, "Ambient Pb's Contribution to Class 1 Area Visibility Impairment," June 17, 2011.

Sections 126(b) and 126(c) of the CAA affect a state only if the Administrator has been petitioned to make a finding of violation that is related to either interstate transport or international transport of emissions from sources in the state. Thus, unless a state has been the subject of such a petition, the state has no continuing obligation under sections 126(b) or 126(c).

Section 115 of the CAA authorizes the Administrator to require a state to revise its SIP under certain conditions to alleviate international transport. Because there are no pending actions pursuant to Section 115 of the CAA, EPA has no expectation that the state would need to submit anything in regards to Section 115 at this time.

Section 110(a)(2)(E): Adequate personnel, funding, and authority

"Each such plan shall [. . .] provide:

(i) necessary assurances that the state (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the state or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under state (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of federal or state law from carrying out such implementation plan or portion thereof),

(ii) requirements that the state comply with the requirements respecting state boards under section 128,

(iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the state has responsibility for ensuring adequate implementation of such plan provision."

The infrastructure SIP should assure that the state has adequate *personnel and funding* to implement the Pb NAAQS. See EPA's regulations at 40 CFR Part 51, subpart M ("Intergovernmental Consultation") and subpart O ("Miscellaneous Plan Content Requirements"). For example:

- In accordance with EPA's regulations at subpart M, the infrastructure SIP should identify the organizations that will participate in developing, implementing, and enforcing the SIP as a whole. The infrastructure SIP should identify the responsibilities of such organizations and include related agreements among the organizations. See 40 CFR 51.240, "General plan requirements." In accordance with EPA's regulations at subpart O, the infrastructure SIP should describe resources for carrying out State programs and requirements. Resources to be

described include: (1) those available to the state (and local agencies, where appropriate) as of the date of infrastructure SIP submittal; (2) those considered necessary during the 5 years following infrastructure SIP submittal; and (3) projections regarding acquisition of the described resources. See 40 CFR 51.280, "Resources." Further, the infrastructure SIP should assure that the state has adequate *authority* under its rules and regulations to carry out the state's SIP obligations with respect to the 2008 Pb NAAQS and to revise the SIP as necessary. See EPA's regulations at 40 CFR Part 51, subpart L ("Legal Authority") and subpart O ("Miscellaneous Plan Content Requirements*").* For example:

- In accordance with EPA's regulations at subpart L, the infrastructure SIP should show that the state has the legal authority to carry out the plan; the provisions of the state's laws or regulations that provide that authority are to be specifically identified in the infrastructure SIP, and copies of the laws or regulations should be included in the infrastructure SIP submittal. See 40 CFR sections 51.230 through 51.231.
- In accordance with EPA's regulations at subpart O, the infrastructure SIP submittal should include copies of rules and regulations that show that the state has adopted the emission limitations and other measures necessary for attainment and maintenance of the 2008 Pb NAAQS. See 40 CFR 51.281, "Copies of rules and regulations."

In accordance with sub-element (ii), the infrastructure SIP should include requirements that the state comply with CAA 128, "State Boards."[10] Section 128 of the CAA states:

> *Sec. 128. (a) Not later than the date one year after the date of the enactment of this section, each applicable implementation plan shall contain requirements that –*
>
> *(1) any board or body which approves permits or enforcement orders under this Act shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under this Act, and*
>
> *(2) any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed.*

[10] EPA's operative guidance on these SIP requirements can be found in a memorandum dated March 2, 1978, from David Bickart, Deputy General Counsel, to Regional Air Directors, entitled "Guidance to State for Meeting Conflict of Interest Requirements of Section 128."

A State may adopt any requirements respecting conflicts of interest for such boards or bodies or heads of executive agencies, or any other entities which are more stringent than the requirements of paragraphs (1) and (2), and the Administrator shall approve any such more stringent requirements submitted as part of an implementation plan.

Finally, the infrastructure SIP should assure that the state retains responsibility for ensuring adequate implementation of the state's SIP obligations with respect to the 2008 Pb NAAQS. A state may assign responsibility for carrying out a portion of its SIP to a state government agency other than the state air pollution control agency, if the SIP demonstrates that such other agency has the necessary legal authority. Similarly, the state may authorize a local agency to carry out the SIP or portion of the SIP within the local agency's jurisdiction, if the SIP demonstrates that the local agency has the necessary legal authority; however, the authorizing state is not relieved of responsibility for carrying out the SIP. See 40 CFR 51.232, "Assignment of legal authority to local agencies."

Section 110(a)(2)(F): Stationary source monitoring and reporting

"Each such plan shall [. . .] require, as may be prescribed by the Administrator:

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such source

(iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection."

The infrastructure SIP should provide citations to the state's regulations for source monitoring, recordkeeping, and reporting requirements applicable to Pb, such as the Air Emission Reporting Rule (AERR). In accordance with EPA regulations at 40 CFR Part 51, subpart K ("Source Surveillance"), the infrastructure SIP should identify State requirements that provide for monitoring the status of sources' compliance with the Pb NAAQS. For example, the SIP should include provisions for owners or operators of stationary sources to maintain records of emissions and other information as may be necessary to enable the state to determine whether the sources are in compliance, and the SIP should

further include provisions for the sources to periodically report that information to the state. See 40 CFR 51.211, "Emission reports and recordkeeping."

In accordance with EPA regulations at 40 CFR Part 51, subpart A ("Air Emissions Reporting Requirements") and subpart Q ("Reports"), the responsible state agency should analyze the Pb emissions data and correlate such data with applicable emission limitations or standards. The infrastructure SIP should identify state requirements providing for periodic reporting of emissions inventory data by the state to the Administrator (through the appropriate Regional Office). See 40 CFR 51.321. All reports should be made available to the public.

Section 110(a)(2)(G): Emergency episodes

"Each such plan shall provide for authority comparable to that in section 303 of this Title and adequate contingency plans to implement such authority."

Section 303 of the CAA provides authority to the EPA Administrator to restrain any source from causing or contributing to emissions which present an "imminent and substantial endangerment to public health or welfare, or the environment." As directed under section 110(a)(2)(G), each SIP submittal should specify authority, rested in an appropriate official, to restrain any source from causing or contributing to Pb emissions which present an imminent and substantial endangerment to public health or welfare, or the environment. Based on EPA's experience to date with the Pb NAAQS and designating Pb nonattainment areas, EPA expects that such an event would be unlikely and, if it were to occur, would be the result of a malfunction or other emergency situation at a relatively large source of lead. Accordingly, EPA believes that the central components of a contingency plan would be to reduce emissions from the source at issue (if necessary by curtailing operations) and public communication as needed. In addition, if a state believes, based on its inventory of lead sources and historic ambient monitoring data, that it does not need a more specific contingency plan beyond having authority to restrain any source from causing or contributing to an imminent and substantial endangerment, then the state could provide such a detailed rationale in place of a specific contingency plan. EPA notes that 40 CFR Part 51, subpart H (51.150-51.152) and 40 CFR, Part 51, Appendix L do not apply to Pb, but States may wish to consult subpart H and Appendix L as illustrative guidance of what constitutes appropriate contingency planning for other pollutants.

Section 110(a)(2)(H): Future SIP revisions

"Each such plan shall [. . .] provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter (CAA)."

The infrastructure SIP should provide citations to the state regulatory provisions requiring the state to 1) revise its section 110 plan from time to time as may be necessary to take into account revisions of such primary or secondary NAAQS or the availability of improved or more expeditious methods of attaining such standards; and 2) revise its section 110 plan in the event the Administrator finds the plan to be substantially inadequate to attain the NAAQS. See 40 CFR 51.104, "Revisions".

Section 110(a)(2)(I): Nonattainment area plan or plan revision Under Part D

"Each such plan shall [. . .] in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas)."

As noted above, EPA would not expect infrastructure SIP submissions to address subsection 110(a)(2)(I). Nonattainment area plans required under part D are required on a different schedule from the section 110 infrastructure elements and will be reviewed and acted upon through a separate process.

Section 110(a)(2)(J): Consultation with government officials, public notification, PSD and visibility protection

"Each such plan shall [. . .] meet the applicable requirements of section 121 of this Title (relating to consultation), section 127 of this Title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection)."

The infrastructure SIP should reference the state rules that provide a process of consultation with general purpose local governments, designated organizations of elected officials of local governments, and any federal land manager having authority over federal land to which the plan applies, consistent with the requirements of CAA § 121.

The infrastructure SIP should provide citations to regulations requiring the state to regularly notify the public of: instances or areas in which any primary NAAQS was exceeded; the associated health hazards; and ways in which the public can participate in regulatory and other efforts to improve air quality. See 40 CFR 51.285, "Public notification".

Pursuant to the CAA, an infrastructure SIP should identify state requirements that allow a state to implement any new PSD requirements that are triggered upon the effective date of any new NAAQS. However, sources in a state may be subject to the federal PSD requirements pursuant to 40 CFR 52.21, if a state does not have a SIP-approved PSD program. As described in this infrastructure SIP guidance for element (C), such states remain obligated to adopt and submit a PSD program for EPA approval that applies to all regulated NSR pollutants, including GHG. Until a state provides such a program, its infrastructure SIP would not be approvable with respect to CAA Section 110(a)(2)(J).

With regard to the requirement of the plan to meet the applicable requirements for visibility protection, EPA would not expect to treat this provision as applicable for purposes of the infrastructure SIP approval process. EPA recognizes that states are subject to visibility protection and regional haze program requirements under Part C of the Act (which includes sections 169A and 169B). However, in the event of the establishment of a new primary NAAQS, the visibility protection and regional haze program requirements under part C do not change. Thus, EPA concludes there are no new applicable visibility protection obligations under section 110(a)(2)(J) as a result of the 2008 Pb NAAQS.

Section 110(a)(2)(K): Air quality modeling/data

"Each such plan shall [. . .] provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator."

The infrastructure SIP should demonstrate that the state has the authority and technical capability to conduct air quality modeling in order to assess the effect on ambient air quality of relevant pollutant emissions; and that the state can provide relevant data as part of the permitting and NAAQS implementation processes. The infrastructure SIP should also identify state regulations providing that, upon request, the state will submit current and future data relating to such air quality modeling to the Administrator. EPA anticipates that the predominant type of air quality modeling to be conducted with respect to implementing the Pb NAAQS will be source-oriented dispersion modeling with models such as AERMOD.

Section 110(a)(2)(L): Permitting fees

"Each such plan shall require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter Title) V of this chapter."

The infrastructure SIP should provide citations to the regulations providing for collection of permitting fees under the state's EPA-approved Title V permit program. See 40 CFR 70.9 ("Fee determination and certification"), and 40 CFR Part 70, Appendix A, "Approval Status of State and Local Operating Permits Programs".

Section 110(a)(2)(M): Consultation/participation by affected local entities

"Each such plan shall [. . .] provide for consultation and participation by local political subdivisions affected by the plan."

To satisfy this element (M), and in accordance with EPA's regulations at 40 CFR Part 51, subpart M ("Intergovernmental Consultation"), the infrastructure SIP should identify the organizations that will participate in developing, implementing, and enforcing the state air quality program. Further, the infrastructure SIP should identify the responsibilities of such organizations and include related agreements among the organizations. See 40 CFR 51.240, "General plan requirements." The infrastructure SIP should identify policies or procedures requiring consultation and participation by local political subdivisions affected by the infrastructure SIP. For example, the infrastructure SIP should provide a citation to the state regulations that provide notice and opportunity for public hearing in accordance with EPA regulations at 40 CFR Part 51, subpart F ("Procedural Requirements").

Prior to submitting an infrastructure SIP revision or a compliance schedule, a state must provide notice, provide the opportunity to submit written comments, and allow the public the opportunity to request a public hearing. See 40 CFR 51.102, "Public hearings."

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR - 6 2011

OFFICE OF
AIR AND RADIATION

SUBJECT: Regional Consistency for the Administrative Requirements of State Implementation Plan Submittals and the Use of "Letter Notices"

FROM: Janet McCabe, Deputy Assistant Administrator JGM
Office of Air & Radiation

TO: Regional Administrators, Regions I – X

The National State Implementation Plan (SIP) Reform Workgroup is a cooperative initiative between EPA, the National Association of Clean Air Agencies (NACAA), and the Environmental Council of the States (ECOS), and includes representatives from Sacramento, California; Linn County, Iowa; Kentucky; Maryland; Nevada; New York; Ohio; South Carolina, Utah and Wisconsin, as well as EPA's Office of Air and Radiation (OAR), EPA Regions I, III and VII and the ECOS and NACAA Headquarters offices. It is facilitated by Jim Blizzard of ECOS, Nancy Kruger of NACAA, and Carey Fitzmaurice of OAR. The ECOS and NACAA memberships have identified a number of SIP-related issues for improving the entire "SIP Process" from the time EPA promulgates a new or revised NAAQS through to the time of formal submittals to Regional Offices for completeness determinations and rulemakings. Given these issues identified by ECOS and NACAA, as well as our own recognition that the SIP process needs to be improved and streamlined, there are a number of ongoing initiatives related to SIP Reform. Many of the ECOS/NACAA-identified SIP reform issues involve EPA providing states and localities the opportunity to participate upfront in such things as designation procedures, implementation rules, and other forms of national SIP guidance related to modeling, weight of evidence (WOE), etc. Tackling these SIP reform issues requires action on the part of OAR, and representatives from OAQPS are actively participating on the Workgroup. However, many of the ECOS/NACAA-identified issues center around Regional consistency. The Regional Air Division Directors and Air Program Managers agree that addressing these issues is primarily the Regions' responsibility.

The purpose of this memorandum is to address the first group of issues identified by the Workgroup. These issues involve consistency between all ten Regional Offices and represent the first increment of success in this collective effort to improve the SIP process. Attachment A's focus is to standardize what every Regional Office requires from its State, Local, and Tribal agencies when those agencies formally submit a SIP revision (hereafter the term State will be used to mean all those agencies formally authorized to submit SIPs and TIPs) and to simplify

those requirements where possible. It addresses the issue raised by ECOS and NACAA urging EPA to reduce the number of hard paper copies required when submitting SIP revisions.

The other attachments to this memorandum cover issues related to the public notice and hearing requirements for SIP revisions, the differences between Clean Data Determinations and Redesignations, and the types of SIP revisions eligible for approval by "Letter Notice" versus full "notice and comment" rulemaking.

Nothing in the attachments to this memorandum is intended to require changes to the Clean Air Act (CAA), the current Code of Federal Regulations (CFR) at 40 CFR Part 51 or Appendix V to Part 51. However, with regard to Attachment A there remains the need to satisfy the requirements of 40 CFR Part 51.103(a) as to the number and types of copies of a SIP revision that must be submitted by the State to EPA. 40 CFR Part 51.103(a) says the State must provide "five hard copies or at least two hard copies with an electronic version of the hard copy (unless otherwise agreed to by the State and Regional Office) of the plan to the appropriate Regional Office with a letter giving notice of such action. If the State submits an electronic copy, it must be an exact duplicate of the hard copy." Given the flexibility afforded in Part 51.103(a), compliance with its requirements can be achieved by each Regional Office having a record of an agreement between the Region and its States that the procedures outlined in Attachment A be followed when submitting a SIP revision. The Office of General Counsel (OGC) has advised that all ten Regions could easily pursue such an agreement with a presumptive letter from each Regional Administrator (RA) to the States in his/her Region, i.e. "We are agreeing to the following procedures for SIP submittals from you, and assume that you agree to these procedures unless we hear otherwise from you by [date]." Such letters would enclose this memorandum and its attachments. A model letter has been developed for use by all ten Regions.

The attachments to this memorandum have the concurrence of all ten Regional Air Division Directors, OAR and OGC. There is consensus among all ten Regions to implement these standardized procedures as quickly as possible via the RA letter described in the preceding paragraph. The ECOS/NACAA members of the National SIP Reform Workgroup were given the opportunity to provide feedback on these procedures and have endorsed their implementation as a significant step in our SIP reform efforts.

There will be additional efforts to address the remaining and any future issues concerning Regional consistency and communications with States. For example, the Regions will work together to develop procedures to:

1. Require the same level of detail and documentation in the technical portions of SIP submittals from all States.

2. Provide early, upfront and consistent guidance to all States regarding how to interpret and meet the requirements of implementation plans and other national rules.

3. Work with Multi-jurisdictional Organizations (MJOs) and Regional Planning Organizations (RPOs) that are performing the technical work (emission inventories, modeling, etc.), developing model rules, and designing SIP templates for their member States such that when the States submit their SIPs that include these

MJO/RPO work products there are no EPA requests for additional submissions and/or revisions late in the SIP submittal process.

The Regional members of the longstanding SIP Processing Work Group (which is separate from the National SIP Reform Workgroup) are contacts to whom questions regarding this memorandum may be addressed. They are as follows:

Region 1 – Donald Cooke
Region 2 – Paul Truchan
Region 3 – Harold Frankford
Region 4 – Nacosta Ward/Sara Waterson
Region 5 – Christos Panos
Region 6 – Carl Young
Region 7 – Jan Simpson
Region 8 – Kathy Dolan
Region 9 – Cynthia Allen/Lisa Tharp
Region 10 – Donna Deneen

cc: Regional Air Division Directors
Regional Air Program Managers
Regional Counsels for Air
OAR Office Directors in OAQPS, OTAQ, and OAP
OGC Air Office
ECOS/NACAA SIP Reform Work Group Members
(for distribution to full memberships)

Attachment A – Number and Types of Copies of SIP Submittals Required to be Submitted

Identified Constraints:

Currently the Federal Courts only recognize the "paper" (hard copy) of the rulemaking docket as the official docket when a SIP approval or disapproval is subject to litigation. The same is true when a Federal enforcement action is taken against a source for a SIP violation. Therefore, at this time, each EPA Regional Office must create and maintain a paper docket, including the State submittal, as well as the E-Docket to upload in the Federal Document Management System (FDMS) for each SIP-related rulemaking. It is also, therefore, necessary for the letter submitting the SIP revision to be a signed, dated paper original letter from the State official authorized to submit SIP revisions.

EPA also needs an electronic copy of the State submittal in searchable.pdf format to load into the FDMS. The Regions are prepared to generate this form of electronic copy in those instances when a State is unable to do so.

SIP Submittals:

1. One paper copy of the SIP revision submitted to EPA by an original, dated letter signed by the State official authorized to submit SIP revisions and addressed to either the Regional Administrator (RA) or the Director of the Air Division in a given Regional Office (provided the RA has delegated the authority to receive SIP revisions to the Air Division Director). Many of the administrative requirements for complete SIP revisions found at 40 CFR Part 51, Appendix V, 2.1, may be met by statements made in the submittal letters.

2. One electronic copy of the entire SIP revision along with the paper copy, preferably on disk, or otherwise made available to the Regional Office e.g., by e-mail, from a File Transfer Protocol (FTP) site or from the State website at the same time the paper copy is submitted. It makes it much easier for EPA if the electronic copy is made available in searchable.pdf format because that is the format required to be uploaded in to the FDMS.

3. In the original, dated paper version of the letter signed by the State official authorized to submit SIP revisions, there must be statement certifying that any electronic copy provided by the State to EPA whether by disk or otherwise made available to the Regional Office is an exact duplicate of the hard copy.

4. If the State is unable to provide an electronic copy in searchable.pdf format, the Regional Office can accept an electronic copy in image.pdf format, Microsoft Word, or Microsoft Excel and convert it to searchable.pdf format to load into the FDMS. Likewise, if a State only submits a paper copy and has no means of making an electronic copy available to EPA, the EPA Regional Office will scan the paper copy and create an electronic copy in searchable.pdf format to load into the FDMS.

5. Even for the single official paper copy identified under number 1. above, States do not have to submit paper copies of large data files such as ambient air quality data, emissions inventories, model input files, etc. if the State puts such supporting data files on a disk (or disks) and submits the disk along with the paper copy. Such disks should be submitted with the official paper copy in order for the official SIP submittal to be complete. EPA cannot "complete" the official submittal for the State by accessing such data files from an e-mail, FTP or website.

6. "Model" SIP submittal letters are available from the Regional Offices.

Caveats:

1. EPA is able to "retrieve" the "unofficial" electronic copy via e-mail, from an FTP or a state website only because the State submitted the official paper copy. Whatever material EPA receives via e-mail or accesses from an FTP or website is not the official submittal.

2. The State should identify any copyrighted material in its submittal as EPA does not place such material on the web when creating the E-Docket for loading into FDMS.

3. States are urged not to include any material considered Confidential Business Information (CBI) in their SIP submittals. In rare instances where such information is necessary to justify the control requirements and emission limitations established by the SIP revision (e.g., for a source-specific SIP revision), States should confer with their Regional Offices prior to submittal and must clearly identify such material as CBI in the submittal itself. EPA does not place such material in either the paper docket or the web when creating the E-Docket for loading into FDMS. However, where any such material is considered emissions data within the meaning of Section 114 of the CAA, it cannot be withheld as CBI and must be made publically available.

Notes: The use of STAG (105) funds by States to purchase the software/equipment needed to create electronic copies in searchable.pdf format is an acceptable expense, and many States have opted to do so. A State may indicate such purchases in the appropriate portion of its 105 grant application.

Future Activities: EPA is committed to work with the Department of Justice to continue to pursue options for reducing and eventually eliminating the paper (hardcopy) submittals of SIP revisions in favor of electronic submittals.

Attachment B – Public Notices/Hearings Required by Sec. 110 of the CAA

Identified Constraints:

As explained below, EPA has made significant reforms in the SIP process regarding public notices and public hearings. However, States may implement these reform opportunities only to the extent allowed by State law because a basic requirement for an approvable SIP revision is that it was developed and adopted by the State agency in accordance with such law and its legal authority.

Public/Notice Hearing:

1. The public notice and public hearing requirements for SIP revisions are found at 40 CFR Part 51.102. These Federal regulations indicate that the State must afford the opportunity to submit written comments and allow the public to request a public hearing either by announcing a hearing in the notice for comments or by providing the opportunity to request a hearing in that notice. Each State must have legal authority setting out its public notice procedures and EPA has already approved these procedures as meeting the minimum requirements of the CAA.

2. EPA has determined that the term "prominent advertisement" as used in 40 CFR Part 51 when referring to the public notice required by Section 110 of the CAA for SIP revisions is media neutral. The State may continue the use of newspapers to publish these notices or may opt to publish such notices elsewhere so long as the State has determined that the public would have routine and ready access to such alternative publishing venues. States may also choose a combination approach whereby a short (and presumably less expensive) notice is published in a newspaper that informs the public where to access the complete public notice that satisfies all of 40 CFR Part 51 requirements.

3. EPA recognizes that many States use a single public notice and hearing to satisfy their own State adoption process requirements, Section 110 of the CAA and 40 CFR Part 51. This has long been and continues to be an acceptable practice. However, in order to satisfy the CAA and 40 CFR Part 51, the notice must clearly state that the regulations and/or documents that are the subject of the public notice will be submitted to the United States Environmental Protection Agency to be included in or to revise the State Implementation Plan required by the Clean Air Act and should identify the CAA requirements the revisions are intended to meet. Unless the public notice includes this statement, Section 110 of the CAA has not been satisfied.

4. The regulations provide that any public hearing must be announced in a public notice at least 30 days prior to the hearing, and that notice must include the date, place, and time of the public hearing. If the State receives a request for a public hearing, it must hold the already scheduled hearing as described in the original public notice or schedule a public hearing through a separate notice. To avoid having to re-publish a second notice to provide 30 days advance notice of a public hearing, States are strongly encouraged to schedule a public hearing in the original public notice. Under 40 CFR part 51.102(a), the

State may cancel the public hearing if no request for a public hearing is received during the 30-day notification period, so long as the original public notice announcing the 30-day notification period clearly states: *If no request for a public hearing is received, the hearing will be cancelled; identifies the method and time for announcing that the hearing has been cancelled; and provides a contact phone number for the public to call to find out if the hearing has been cancelled.*

5. Pursuant to the regulations, the entire SIP revision must be made available for public review and comment including supporting technical materials and other information the State has relied upon or intends to rely upon to justify the approvability of the SIP revision.

Caveats:

As noted above, States often publish a single public notice and hold a single public hearing to satisfy State requirements for adoption of State rules/regulations as well as Section 110 of the CAA and 40 CFR Part 51 requirements. This usually means that the public notice and hearing are held on a proposed state rule/regulation. Two important points:

1. There is no independent Federal requirement that the public notice and hearing required by Section 110 of the CAA or 40 CFR Part 51 be held on proposed State regulations. However, 40 CFR Part 51, Appendix V, 2.1 (e) requires that the State must have followed all of the procedural requirements of the State's law and constitution in conducting and completing adoption/issuance of the SIP revision. So if State law requires public notice and hearing at the proposed stage of regulation adoption, then public notice must be given and hearing must be held on proposed regulations to satisfy 40 CFR Part 51.

   EPA is aware that under State law certain types of SIP regulations are not required to undergo public notice and hearing procedures as part of the State adoption process. In such instances, the public notice and hearing requirements of 40 CFR Part 51.102 may be held on fully adopted State regulations. The Federal requirement for public notice and hearing is to inform the public that the SIP is being revised and allow for comment as to whether the State regulations satisfy a specific obligation under the CAA.

2. The Federal requirement for public notice and hearing is to inform the public that the State intends certain regulations and other actions to fulfill specific CAA requirements and thus to revise the SIP. So if a regulation is significantly changed by the State between the time of proposal and final adoption, it may be necessary for the State to conduct the public participation procedures required by 40 CFR Part 51.102 on the final regulations being submitted as a SIP revision.

Notes: EPA Regional Offices will provide "model" public notices for States to use satisfy Section 110, and 40 CFR Part 51.102 upon request.

Attachment C – Determinations of Attainment by an Area's Attainment Date v. Clean Data Determinations & Redesignation Requests and Maintenance Plans

Introduction: The issue of Redesignations v. Clean Data Determinations and what a State must provide to an EPA Regional Office for each type of submittal has been raised by the States to EPA for both clarification and Regional consistency. These are very different types of actions and achieve different results as explained in this Attachment.

There is also a distinction between a Determination of Attainment by an area's attainment date and a Clean Data Determination which is explained below.

The Distinction between a Determination of Attainment by an Area's Attainment Date and a Clean Data Determination

It is important to distinguish between two different types of attainment determinations that EPA makes for areas that are designated nonattainment. Both types require notice-and-comment rulemaking.

(1) Determinations of Attainment by an area's attainment date, and
(2) Determinations of Attainment for purposes of suspending the State's obligation to submit certain planning SIPs linked to attainment (so-called Clean Data Determinations).

With respect to Type 1, the Clean Air Act requires EPA to determine whether a nonattainment area has attained the standard as of its applicable attainment date. These Determinations of Attainment provide a historical snapshot -- they evaluate attainment only as of an area's attainment deadline, and are issued to comply with Section 181(b)(2) for ozone and Sections 172 and 179 for $PM_{2.5}$. Determinations of Attainment by an attainment deadline are separate and independent of the second type of attainment determinations, Clean Data Determinations, which are not compelled by the CAA.

With respect to Type 2, Clean Data Determinations originated in EPA's Clean Data Policy, but are now linked to EPA regulations. These determinations invoke either 40 CFR Part 51.918 for ozone or 51.1004(c) for $PM_{2.5}$. Unlike determinations by an attainment deadline, Clean Data Determinations are subject to revision based on changes in air quality, and must be sustained by continuing attainment. They function to suspend a State's obligation to submit certain attainment-related planning SIP obligations for a designated nonattainment area. The suspension continues until EPA determines that a violation has occurred, or EPA redesignates the area from nonattainment to attainment.

These two types of determinations are conceptually and legally distinct. They arise from different authorities and result in different consequences. However, they both address air quality and can be based on the same or overlapping years of air quality data.

Clean Data Determinations - See 40 CFR Part 51.918 for ozone and 51.1004(c) for PM2.5.

Criteria: Either the State may request or EPA may, on its own, initiate the rulemaking to make a Clean Data Determination. A Clean Data Determination requires a demonstration that what is needed is for the most recent 3 years of complete air quality data have been entered into AIRS-AQS, have been quality assured, and indicate attainment. In addition, the air quality data available to date (meaning as of the date of the final rulemaking action), even if not complete. should be consistent with continued attainment. As the determination of what is complete and incomplete data as of the time of final rulemaking differs from criteria pollutant to criteria pollutant depending upon the form of the standard, the Regional Office will work closely with the State to ensure that the available data at the time of final rulemaking is considered consistent with continued attainment.

The EPA Regional Office will conduct the notice and comment rulemaking to make the Clean Data Determination. The key issues in the rulemaking action are the validity of the ambient air quality data themselves and the location and operation of the monitor(s) from which those data have been collected in order to ensure that the data are complete, quality assured and representative of the designated nonattainment area.

Results: Upon EPA's promulgation of a final Clean Data Determination for a nonattainment area, the obligation for the State to submit for such an area the attainment demonstration, associated reasonably available control measures, reasonable further progress plan, contingency measures, and other attainment-related planning requirements is suspended until such time as the area is redesignated to attainment, at which time the requirements no longer apply; or until EPA determines that the area has violated the NAAQS, at which time the obligations would again apply.

The suspension of the planning requirements saves the State and EPA the resources involved in developing, adopting, submitting, evaluating, and performing rulemaking for unneeded planning requirements as SIP revisions.

The Clean Data Determination serves as notice to the public that the nonattainment area's air quality meets the NAAQS.

Caveats: A Clean Data Determination does not have the effect of a redesignation to attainment. The area remains designated nonattainment and nonattainment area requirements such as New Source Review (NSR) and conformity continue to apply until the State submits a request for redesignation including the CAA-required maintenance plan and EPA approves them.

If a State has an area for which a Clean Data Determination has been made and the State has submitted or submits SIP revisions for the suspended planning requirements, it may inform EPA that it wants these SIPs approved (for example, to enable the State to submit a redesignation request). Otherwise the State may opt to withdraw the SIPs submitted for the suspended requirements. Prior to requesting withdrawal, the State should consider the fact that it may want the mobile budgets in an attainment demonstration or RFP plan approved. Where the State does not withdraw any such SIP submissions, EPA remains obligated to act on them.

Requests for Redesignations and Maintenance Plans – See Section 107(d)(3)(E)

Introduction: To redesignate an area from nonattainment to attainment is an important action that demonstrates success in the air quality planning process. Redesignation acknowledges not only that an area has met the relevant air quality standard, but also that the State has satisfied relevant requirements and shown that the area can continue to meet the standard for the decade following redesignation. EPA recognizes that the nonattainment designation of an area can affect its ability to attract economic development. Once an area is redesignated from nonattainment to attainment, it is likely better positioned to attract new and expanding businesses and industry. When an urban area is redesignated from nonattainment to attainment, the city may move up in the ranking of "Most Livable Cities" which may help it attract new residents and retain its existing population. Given these considerations, EPA is committed to work closely with States in the preparation and submittal of redesignation requests and maintenance plans and to make this work a priority so that submittals can be evaluated quickly and effectively. That said, individual Regions and States are encouraged to confer and determine which SIP revisions are the highest priorities as certain SIP revisions may be needed to avoid findings, halt sanctions/FIP clocks, respond to SIP calls, and/or be necessary to be approved in order for an area to be eligible for redesignation from nonattainment to attainment.

Criteria: Requests to redesignate an area from nonattainment to attainment and the submittal of the CAA-required maintenance plans as SIP revisions are State-initiated actions. EPA approves the redesignations in 40 CFR Part 81 and the maintenance plans as SIP revisions in 40 CFR Part 52. There are five statutory requirements that must be met for EPA to approve the redesignation of an area from nonattainment to attainment:

1. EPA determines that area has attained the NAAQS (three years of complete quality assured data in AIRS-AQS that show attainment);
2. EPA has fully approved the area's applicable implementation plan (i.e., the plan developed for the particular nonattainment pollutant) under section 110(k) of the CAA;
3. EPA determines the improvement in the area's air quality is due to enforceable reductions in emissions resulting from implementation of the applicable implementation plan, applicable Federal air pollution control regulations, and other permanent enforceable reductions;
4. The area has a fully approved maintenance plan meeting section 175A of the CAA; and
5. The State has met all of the requirements applicable (for purposes of redesignation) to the area under Section 110 (the applicable infrastructure SIP requirements) and Part D (the applicable nonattainment area SIP elements).

SIP Submittals: A Section 175A maintenance plan is a SIP revision and must meet all of the administrative requirements of Part 51 and Part 51 Appendix V for a complete submittal.

Under the CAA, a Section 175A maintenance plan must provide for the maintenance of the NAAQS in the area for at least 10 years after the redesignation; this means for at least 10 years from EPA's final rule approving the redesignation. As the CAA provides up to 18 months for EPA to complete rulemaking on a redesignation request, the maintenance plan at the time of submittal should provide for attainment for at least 11 years and six months. EPA recommends to States that it provide for attainment for 12 years from the time of formal submittal to allow for completing the redesignation rulemaking processes.

When submitting a request for redesignation, the State does not have to re-submit SIP revisions it has already submitted to EPA to satisfy section 110 and Part D of the CAA. In its submittal of the redesignation request it may cite to the submittal dates of those SIP revisions. For any SIP revisions that have been already been approved, it may provide the dates and Federal Register citations of the EPA approvals.

When evaluating a redesignation request and maintenance plan to determine whether or not all Section 110 and Part D SIP requirements have been met, EPA does not require that the area have a fully approved nonattainment pre-construction NSR permitting program for new major sources and major modifications, if the State demonstrates that the area can continue to maintain the standard with the Prevention of Significant Deterioration (PSD) program. Once an area is redesignated from nonattainment to attainment the Part C requirements for Prevention of Significant Deterioration apply for the pre-construction permitting of new major sources and modifications.

The contingency measures of a Section 175A maintenance plan, unlike the contingency measures of an attainment demonstration plan or reasonable further progress (RFP) plan, may not be implemented "early" by the State. These are the contingency measures that the State will implement if the maintenance plan's triggers for such measures occur (e.g., emissions projections exceed the levels projected in the plan or the area violates the NAAQS). These contingency measures and their schedule for implementation need to be clearly identified in the maintenance plan.

How much documentation is necessary for the maintenance plan's "maintenance demonstration" of maintenance for 10 years after the EPA's final approval of the redesignation is dependent upon the form of the "maintenance demonstration." For example, if growth projections are used to "grow" a recently already approved SIP emission inventory (or inventories where multiple precursors are involved) for the area, it may not be necessary to resubmit all of the documentation for that emission inventory as part of the maintenance plan. In such cases the State may be able to cite to the submittal and/or approval of that emissions inventory to EPA. However, the State will still need to explain and justify their growth projections and any other factors applied to that inventory.

The maintenance plan for areas where RFP plans and attainment demonstrations have been approved will also have to identify mobile budgets. For other areas, the maintenance plan will still need to include provisions for how conformity will be done after the area is redesignated.

Effects of a Redesignation: Once redesignated to attainment, the area's applicable SIP's NSR provisions for minor sources apply and the requirements of the Prevention of Significant Deterioration (PSD) program apply for the pre-construction permitting of new major sources and major modifications. The conformity requirements applicable in the attainment area will then apply as outlined in the approved maintenance plan including any applicable mobile budgets.

In the event the area violates the NAAQS after redesignation, the area is not immediately subject to redesignation back to nonattainment. Rather the maintenance plan's contingency measures are to be implemented and other actions taken by the State to promptly correct the violation (e.g. non-compliance of a source or sources) and address the situation.

Attachment D – The Use of Letter Notices

Constraints: Because the use of Letter Notices by EPA to approve SIP revisions does not provide for public comment, the use of such letters is limited to those types of SIP revisions where "common sense" would indicate that the public and regulated sector would have no interest in commenting on EPA's approval.

EPA's rulemaking procedures for SIP revisions are governed by the Federal Administrative Procedures Act (APA). While that statute does not include provisions for Letter Notices to do SIP approvals, EPA has been using Letter Notices to approve a very narrow range of SIP revisions because such actions fit under the good cause exemption of the APA's notice and comment requirements.

Even purely administrative SIP revision approvals that do not make any substantive changes to SIP requirements do amend the CFR, namely the State's Subpart of 40 CFR Part 52. Accordingly, the Office of the Federal Register would have to be consulted before additional types of SIP revisions would become candidates for approval by Letter Notices.

Types of SIP Revisions for Which Letter Notices May be Used by EPA:

As first described in the 1989 SIP Processing Reform notice (54 FR 2218), under the Letter Notice procedure, EPA sends a letter to the affected states and parties rather than undertaking a notice-and-comment rulemaking. Use of Letter Notice is limited to truly insignificant SIP actions. No notice will be published in the Federal Register prior to sending final letter notice approvals to the State and affected parties. The letter to the State will be EPA's only and final action approving such minor SIP revisions.

The Agency periodically publishes a summary list of all Letter Notice actions in the Federal Register to keep the general public informed of SIP matters. The effective date of the Letter Notice approvals is the date of the letter sent to the State, not the date of the subsequent summary Federal Register notice. Letter Notice approvals do, however, remain subject to judicial review until sixty days after the date of the summary Federal Register notice is published.

Categories of SIP actions appropriate for letter notice include:

1. Re-codification involving no substantive changes;
2. Minor technical amendments or error corrections;
3. Typographical corrections;
4. Address changes; and
5. Similar non-substantive matters

Caveats: The SIP revisions submitted by states that are eligible for approval by EPA by Letter Notice must still meet the administrative requirements for SIP submittal of 40 CFR Part 51.102 and Appendix V

Future Activities: The members of the SIP Reform Workgroup will continue to pursue whether additional types of non-substantive SIP revisions may be added to the list of actions appropriate for Letter Notice. The Workgroup will also explore whether to modify 40 CFR Part 51.102 to provide less to provide less rigorous notice and comment requirements for such non-substantive SIP revisions.

that is a qualified nonpersonal use vehicle as defined in section 274(i) and § 1.274–5(k).

* * * * *

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: May 5, 2010.

Michael Mundaca,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2010–11767 Filed 5–18–10; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0269; FRL–9152–6]

Approval and Promulgation of Implementation Plans; State of California; Legal Authority

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to clarify the contents of the applicable implementation plan for the State of California under the Clean Air Act. Specifically, EPA is taking final action to clarify that the statutory provisions submitted by California and approved by EPA in 1972 supporting the State's legal authority chapter of the original implementation plan were superseded by a subsequent approval by EPA in 1980 of California's revision to the legal authority chapter of the plan. EPA is taking this action to clarify the status in the California plan of the statutory provisions submitted and approved in 1972.

DATES: *Effective Date:* This rule is effective on June 18, 2010.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2009–0269 for this action. The index to the docket is available electronically at *http://www.regulations.gov* or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Gerardo Rios, Chief, Permits Office (AIR–3), U.S. Environmental Protection Agency, Region IX, (415) 972–3974: *rios.gerardo@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

Table of Contents

I. Proposed Action

On January 29, 2010 (75 FR 4742), under the Clean Air Act (CAA or "Act"), we proposed to clarify that the statutory provisions submitted by California in 1972 supporting the State's legal authority chapter of the original implementation plan were superseded by a subsequent approval by EPA in 1980 of a revision to California's legal authority chapter of the plan.

In support of our proposed action, we provided a detailed account of the regulatory context in which the original California State implementation plan (SIP) was submitted and approved by EPA. We also described in detail the contents of the original California SIP, which consisted of 13 parts, the first part ("State General Plan") of which included a chapter 7 ("Legal Considerations"), referred to herein as the "legal authority" chapter. The original SIP also included an appendix (entitled "Appendix II: State Statutes and other Legal Documents Pertinent to Air Pollution Control in California") to the legal authority chapter. The legal authority chapter included many citations to individual sections within the California Health & Safety Code (CH&SC) and other California codes, as well as citations to (then) recently approved legislation, and attorney general opinions as support for the assurance that adequate legal authority exists in the State to meet CAA and EPA SIP requirements.

As described in the proposal, the appendix to the legal authority chapter in the plan (herein, "appendix II") included the specific sections of California code and other legal documents cited in chapter 7, but also included many sections of California code that were not cited specifically in chapter 7. Our proposed rule describes in detail the contents of appendix II and its 14 categories of statutory and other legal documents.

In May 1972, we approved in part and disapproved in part the original California SIP. *See* 37 FR 10842 (May 31, 1972) and 40 CFR 52.220(b). EPA's approval included both chapter 7 and the statutory and other documents contained in appendix II as described above.

As explained in our proposed rule, in response to EPA's request and in response to the Clean Air Act Amendments of 1977, California undertook a comprehensive update to the California SIP. On March 16, 1979, the California Air Resources Board (ARB) submitted a revision to the legal authority chapter of the SIP, entitled "Chapter 3—Legal Authority, Revision to State of California Implementation Plan for the Attainment and Maintenance of Ambient Air Quality Standards (December 1978)," (also referred to herein as "Chapter 3—Legal Authority" or the "revised legal authority" chapter). Much like the original legal authority chapter, the revised legal authority chapter provides an overview of air pollution control in California. While the general topics covered in the revised legal authority chapter were similar to those covered in the original legal authority chapter, the discussion is completely re-organized and updated to reflect, among other things, recodifications of statutory provisions. Also, like the legal authority chapter in the original SIP, the revised legal authority chapter includes numerous citations to individual sections of the CH&SC (which had been re-numbered and re-codified since the time of the original SIP), certain citations to other California codes and other legal documents. However, unlike the legal authority chapter in the original SIP, the revised legal authority chapter, as submitted in 1979, did not include physical copies of the actual statutory provisions nor the other documents cited in the chapter. Instead, the 1979 SIP revision simply incorporates by reference the 1978 edition of *California Air Pollution Control Laws* as "appendix 3–A" to the chapter. Later in 1979, we proposed approval of the revised SIP "Chapter 3—Legal Authority" as an update and clarification of the 1972 SIP. *See* 44 FR 38912 (July 3, 1979). The following year, we took final action, effective September 10, 1980, to approve the revised legal authority chapter. *See* 45 FR 53136 (August 11, 1980) and 40 CFR 52.220(c)(48). Since that time, EPA has not approved any other revision to the chapter that addresses legal authority in the California SIP.

Based upon our review of the relevant provisions of the original California SIP and the related 1979 SIP revision, and the corresponding EPA approval actions, we proposed to clarify the contents of the SIP to reflect our determination that the statutory provisions and other legal documents

submitted in support of the legal authority chapter in the original SIP were superseded by our 1980 approval of the revised legal authority chapter of the California SIP (codified at 40 CFR 52.220(c)(48)) and are no longer part of the California SIP. Our determination that the 1979 submittal of the revised legal authority chapter represented a wholesale replacement of the original chapter was based on the nature and scope of the revised chapter and the mismatch between the statutory citations in the revised chapter and those contained in the original chapter.[1] We also noted that the actual statutory provisions and other legal documents relied upon to support a State's assurance of adequate legal authority need not be approved into the SIP under CAA section 110 or EPA's SIP regulations in 40 CFR part 51 (although such provisions are required to be submitted with the plan). Thus, EPA could approve, consistent with CAA and EPA requirements, and did so in this instance, a wholesale revision to the original legal authority chapter without also approving the actual statutory provisions and other legal documents cited therein.[2]

To memorialize our interpretation of the effect of our 1980 approval of the revised legal authority chapter of the California SIP, we proposed under CAA section 301(a)(1)[3] to revise 40 CFR 52.220(b)(12)(i) to clarify that none of the statutory provisions (and other legal documents) submitted in connection with chapter 7 ("Legal Considerations") of the original California SIP remain in the SIP, not just the few provisions currently listed as being deleted.[4]

Additional background information for today's action can be found in our January 29, 2010 proposed rule (75 FR 4742).

II. Public Comments and EPA Responses

Our January 29, 2010 proposed rule (75 FR 4742) provided for a 30-day comment period. During that period, we received comments from four groups: Earthjustice, on behalf of the Sierra Club, by letter dated March 1, 2010; Center on Race, Poverty & the Environment (referred to herein as "AIR"), on behalf of the Association of Irritated Residents and many other community and environmental groups, by letter dated March 1, 2010; San Joaquin Valley Air Pollution Control District ("District"), by letter dated February 24, 2010; and Greenberg-Glusker law firm (referred to herein as "Dairy Cares"), on behalf of Dairy Cares, a coalition of California's dairy producer and processor associations, by letter dated March 1, 2010.

Earthjustice expresses support for EPA's proposed rule. The three other commenters object to our proposed action. Dairy Cares joins in the District's comments and adds comments of its own. In the following paragraphs, we provide a summary of all significant adverse comments and we provide our corresponding responses. For the purposes of this section of the document, "District" refers herein to both the District and Dairy Cares, whereas "Dairy Cares" is used in reference to the additional comments submitted by this commenter.

Comment #1: AIR contends that there has never been an exemption for agricultural sources in the SIP as it relates to San Joaquin Valley. Under the *Safe Air* case, AIR contends that there can be no exemptions in the SIP by virtue of the original 1972 SIP and 1978 SIP Revision because the SIP's plain language as adopted and submitted contains no exemption and the vague references to California statutory authority are not in the SIP as incorporated by reference in the Code of Federal Regulations (CFR). AIR also asserts that EPA could not have lawfully approved the original 1972 SIP and 1978 SIP Revision with exemptions for agricultural sources without violating the Clean Air Act.

Response #1: We recognize that our approval of the original California SIP in 40 CFR 52.220(a) ("Title of plan: 'The State of California Implementation Plan for Achieving and Maintaining the National Ambient Air Quality Standards' ") and (b) ("The plan was officially submitted on February 21, 1972") on May 31, 1972 (37 FR 10842, at 10851) says nothing about the contents of the original SIP. To uncover its contents, we reviewed a copy of the original SIP maintained in the collection of materials at the National Archives and Record Center in San Bruno, California. From that copy, we determined that the original SIP contained an appendix to the legal authority chapter that contained various statutory provisions, and other legal documents.

Among the statutes in the appendix was CH&SC section 24265, which excludes certain categories of emission sources, including equipment used in agricultural operations in the growing of crops or raising of fowls or animals, from the general grant of authority to local air districts to require permits for new and existing emissions sources (herein, "agricultural permitting exemption"). We found no evidence in the original SIP itself that the materials in the appendix to the legal authority chapter were not intended by the State to be included in the plan itself. Nor did we find any evidence in our approval action that we did not intend to approve the entire contents of the appendix to the legal authority chapter of the original California SIP. In our May 31, 1972 final approval of the original California SIP, we added 40 CFR 52.233, which states: "With the exceptions set forth in this subpart, the Administrator approves California's plan for the attainment and maintenance of the national standards." *See* 37 FR 10842, at 10852. In the case of our May 1972 action on the original SIP, none of the "exceptions set forth in this subpart," such as our findings in 40 CFR 52.225 ("Legal Authority") that the California SIP failed to provide sufficient legal

[1] ARB described the nature and purpose of that agency's comprehensive update of the California SIP during the late 1970's as follows: "The [EPA] has formally requested that the [ARB] update the *State of California Implementation Plan for Achieving and Maintaining the National Ambient Air Quality Standards,* usually referred to simply as the 'SIP.' The original SIP document, submitted to EPA in 1972, has become obsolete largely because of the many modifications to Federal, state, and local air pollution rules and regulations and substantial advancements in technical aspects of air pollution prediction and control. A new *SIP 1978 Working Document* has been prepared as an initial response to the EPA request and contains an updated summary and description of the California SIP. * * * The SIP 1978 Working Document is a step towards replacing the obsolete 1972 SIP." *See* page 1 of Chapter 1 ("Introduction") (April 1978) of the SIP—78 Working Document. Therefore, the revised legal authority chapter was intended by ARB, and approved by EPA, as a wholesale replacement of the original legal authority chapter, including the related statutory provisions and other materials submitted in support of the original chapter.

[2] We view the revised legal authority chapter's incorporation (as appendix 3–A) of the 1978 edition of *California Air Pollution Control Laws* as simply providing a general reference to where the statutory citations in the chapter could be located rather than as having the effect of a literal reading of the provisions into the chapter.

[3] CAA section 301(a)(1) states: "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. * * *." We believe that our rule proposed herein today is necessary to clarify the contents of the California SIP and thereby carry out the functions of EPA in connection with the state's plan.

[4] As noted in the proposed rule, the status of the statutory provisions from the original SIP has recently come into question in the context of third party litigation, an EPA rulemaking action on a revision to new source review rules in the San Joaquin Valley, and a lawsuit filed against EPA challenging certain EPA actions on the premise that such actions were arbitrary and capricious if a certain statutory provision submitted and approved by EPA in connection with the original SIP remains in effect as part of the current applicable California SIP. Thus, we believe that clarification of the status of the statutory provisions (and other legal documents) submitted in connection with the original SIP is necessary and appropriate at this time.

authority to meet the requirements related to air pollution emergencies and to make emissions data publicly available, provide evidence that we disapproved any of contents of the appendix to the legal authority chapter of the original SIP. Therefore, we concluded that the statutory provisions and other legal documents contained in the appendix to the legal authority chapter of the original California SIP were approved along with the rest of the plan in May 1972, and the agricultural permitting exemption found in CH&SC section 24265 was swept into the SIP by virtue of being included among the appendix materials so approved.

AIR points to the *Safe Air* case in support for its contention that no exemptions are in the SIP by virtue of the original 1972 SIP (submitted and approved in 1972) and the "1978 SIP Revision" (*i.e.,* the revision to the legal authority chapter, which was adopted in December 1978, submitted in March 1979, and approved in September 1980). In so doing, AIR states that the SIP's plain language contains no exemption and asserts that the vague references to California statutory authority are not in the SIP as incorporated by reference in the CFR. In the *Safe Air* case, the court held that "SIPs are interpreted based on their plain meaning when such a meaning is apparent, not absurd, and not contradicted by the manifest intent of EPA, as expressed in the promulgating documents available to the public." *See Safe Air for Everyone v. EPA,* 488 F.3d 1088, 1100 (9th Cir. 2007). Under the circumstances of the *Safe Air* case, the court found that the plain language of the Idaho SIP did not include the State's statutory restrictions on regulation of field burning, nor were the statutory restrictions on regulation of field burning made manifest in EPA's approval of the State's open burning rule, and thus, were not relevant in interpreting the existing SIP.

With respect to the agricultural permitting exemption and the California SIP, the existence of the exemption as part of the original California SIP as approved by EPA is apparent from a review of the submitted plan itself. We also do not believe our approval of the exemption in 1972 to be absurd or contradicted by the manifest intent of the State of California or EPA. As such, our interpretation is consistent with the holding of the *Safe Air* case. As clarified in today's action, our approval of California's 1979 update to the legal authority chapter of the California SIP superseded the original legal authority chapter and the related supporting appendix materials in the California SIP, including the agricultural permitting exemption.

Lastly, AIR asserts that EPA should interpret the Agency's California SIP approvals under the presumption that, absent a demonstration to the contrary, we acted consistent with the CAA and related Agency policies, and because in AIR's view, we could not have lawfully approved the original 1972 SIP and the "1978 SIP Revision" with exemptions for agricultural sources without violating the Clean Air Act, then the presumption should be that the exemptions were not approved into the SIP. First, we did not approve the agricultural permitting exemption when we took action in 1980 to approve California's 1979 update to the legal authority chapter of the SIP. As discussed in our January 29, 2010 proposed rule, we have concluded, however, that we did approve the agricultural permitting exemption in 1972 when we approved the original California SIP.

We disagree that our 1972 approval did not comport with the requirements for SIPs under the Clean Air Act and EPA's regulations in effect at that time. Given the state of air pollution knowledge at the time, a SIP exemption from permitting for agricultural sources is not surprising. In 1972, stationary sources had yet to be divided under the Clean Air Act into "major" and "minor" categories (the requirement for permitting of "major" sources came later), and given the state of knowledge concerning air pollution sources and control methods at the time, it is certainly plausible that neither the State of California nor EPA foresaw that regulation of new and modified agricultural sources, as opposed to new and modified factories and smelters, and the regulation of motor vehicles, would be necessary to attain and maintain the national ambient air quality standards (NAAQS).

As noted above, we have concluded that the agricultural permitting exemption, along with the other statutes and legal documents, submitted in the appendix to the legal authority chapter in the original 1972 SIP were approved by EPA and made part of the applicable SIP. To the extent, however, that uncertainty remains on this point, it does not matter from the standpoint of the California SIP over the past 30 years, because, as we are clarifying in this final rule, our 1980 approval of the legal authority chapter superseded the 1972 approval of the corresponding chapter (and its related appendix) such that the agricultural exemption was no longer in the SIP beginning with the effective date of our final rule approving the revised chapter (*i.e.,* September 10, 1980).

Comment #2: The District contends that California's agricultural permitting exemption was approved into the SIP in 1972.

Response #2: We agree. As explained in detail in the January 29, 2010 proposed rule (75 FR at 4743), we have concluded that the statutory provisions contained in appendix II to chapter 7 of the original California SIP, including the agricultural permitting exemption in CH&SC section 24265, were indeed approved into the California SIP. Our interpretation of SIP requirements is that, while the SIP must provide "necessary assurances" of "adequate authority" and must identify the provisions of law that provide for "adequate authority," the statutes themselves need not be approved as part of the SIP. That does not mean that the statutes supporting the legal authority portion of a SIP cannot be approved into the SIP, only that they need not be. In 1972, California submitted the statutes supporting the legal authority chapter of the original California SIP to EPA, and EPA approved the original SIP, with exceptions not relevant here. Thus, while the statutory provisions need not have been approved into the California SIP, we agree that they in fact were so approved in 1972.

Comment #3: The District disagrees with EPA's finding that the statutes supporting California's revised legal authority chapter, as submitted in 1979, were not physically submitted as part of the SIP revision containing the revised chapter. In support of its position, the District cites "appendix 3–A" to "chapter 3—Legal Authority," which was submitted in 1979 and approved by EPA in 1980, and which, in the District's view, contains the 1978 edition of the *California Air Pollution Control Laws,* including the agricultural permitting exemption [by then re-codified to CH&SC section 42310(e)].

Response #3: The legal authority chapter and appendix, as revised in 1979 by California and submitted to EPA, includes several references to the 1978 edition of *California Air Pollution Control Laws.* On page 1, the revised legal authority chapter states:

> "All section references hereafter in this chapter are to the Health and Safety Code unless otherwise indicated. The 1978 edition of *California Air Pollution Control Laws* include all applicable sections of the Health and Safety Code, the Business and Professional Code, and the Vehicle Code. This edition is incorporated as appendix 3–A to this chapter available separately from the ARB Public Information Office, P.O. Box 2815, Sacramento, CA 95812."

As noted in footnote 3 of our January 29, 2010 proposed rule (at 75 at 4744), we view the phrase "this edition is incorporated as appendix 3–A" as simply providing a general reference to where the statutory citations in the chapter could be located, rather than as having the effect of a literal reading of the provisions into the chapter. Our view is supported by the fact that the revised legal authority chapter does not "incorporate by reference" the 1978 edition of *California Air Pollution Control Laws* nor does the chapter identify any State law or rule that provides for a literal reading of large volumes of text into another State document, similar in purpose to the Office of the Federal Register's rules concerning "incorporation by reference" in connection with Federal rules (*See* 1 CFR part 51). In contrast, the statutory provisions and other legal documents supporting the legal authority chapter were physically submitted in "appendix II" to the original California SIP, as discussed above. "Appendix 3–A" itself is only found in the table of contents to the 1979 revised legal authority chapter. Next to the listing of "Appendix 3–A" in the table of contents is the following statement: "*California Air Pollution Control Laws,* 1978 Edition, California Air Resources Board, Sacramento, CA 95812 (available from ARB's Public Information Office)."

Given the facts discussed above, we believe that the District is incorrect in claiming that appendix 3–A to the 1979 revised legal authority chapter "contains" the 1978 edition of *California Air Pollution Control Laws.* At most, it refers to the 1978 edition of *California Air Pollution Control Laws.* Not only did the revised legal authority chapter not contain the statutes, we believe that ARB's approach to keeping the statutes themselves physically separate from the revised legal authority chapter evinces an intent on the part of ARB not to include the statutes themselves in the SIP.

Comment #4: Regardless of whether the statutes were resubmitted, the District claims that EPA provides no support for its finding that the statutory provisions and other legal documents contained in the 1972 SIP were superseded by its approval of California's 1979 revised legal authority chapter.

Response #4: In our proposed rule (75 FR at 4744), we provide the following support for our conclusion that our approval of the 1979 legal authority chapter superseded our earlier approval of the legal authority chapter as well as the statutes and other legal documents submitted in support of the legal authority chapter from the original California SIP:

- Contemporaneous statements by ARB as to the wholesale nature of the SIP update undertaken in 1978 and 1979;
- The mismatch between the statutory citations in the revised legal authority chapter and the statutes submitted in support of the legal authority chapter of the original SIP; and
- Our conclusion that statutes providing support for a State's "necessary assurances" of adequate legal authority for the purposes of CAA section 110(a)(2)(E) need not be approved in the SIP.

As to the third bulleted item, above, the District objects to EPA's conclusion that the statutes providing support for a State's "necessary assurances" of adequate legal authority need not be approved in the SIP to meet CAA and EPA SIP requirements. The District contends that EPA's reading of the SIP requirements in this regard is illogical and unsupported because there is no reason to conclude that statutes that must be submitted with the plan need not be approved into the plan. However, as explained below, the language of both the statute itself and our SIP regulations support our finding that the statutes supporting a State's "necessary assurances" of adequate legal authority need not be approved into the SIP. In other words, the statutes may be approved into the SIP, but are not required to be approved into the SIP.

First, under CAA section 110(a)(2), each SIP shall "(E) provide (i) necessary assurances that the State * * * will have adequate * * * authority under State * * * law to carry out such implementation plan * * *." The statute thus requires that SIPs provide "necessary assurances," of adequate legal authority, not that SIPs must include statutes that establish legal authority. A State's demonstration of "necessary assurances" must be contained in the SIP, but the form in which the demonstration is made can take various forms, including but not limited to a narrative discussion (*e.g.,* legal authority chapter), an Attorney General's letter, the statutes themselves, or some combination of the above. In contrast, for other SIP elements, the CAA requires the underlying regulations to be included in the SIP, not just "necessary assurances" of such regulations. For instance, under section 110(a)(2)(A), each SIP must "include enforceable emission limitations and other control measures * * *." A State's "necessary assurances" of such enforceable emission limitations is not enough to satisfy this CAA requirement. The State must submit the enforceable emission limitations themselves, which generally take the form of air pollution control rules and regulations, to comply with the relevant CAA requirement.

Second, the relevant EPA SIP regulations require that "Each *plan must show* that the State has legal authority to carry out the plan, * * *" (emphasis added) (*See* 40 CFR 51.230), but, as to the statutes themselves, EPA's regulations state: "The provisions of law or regulation which the State determines provide the authorities required * * * must be specifically identified, and copies of such laws or regulations be submitted *with the plan*." (emphasis added). *See* 40 CFR 51.231(a). The phrase, "each plan must show," refers to elements that must be included as part of the plan, whereas the latter phrase, "submitted with the plan," is, at most, ambiguous as to whether the items that must be submitted must also be included in the plan itself. But, when considered with the statutory language in CAA section 110(a)(2)(E) that requires the SIP to include "necessary assurances" of adequate legal authority, not the statutes themselves, it is reasonable to interpret 40 CFR 51.231(a) as requiring the submittal of the statutory provisions (providing support for the necessary showing of adequate legal authority) for the purpose of allowing EPA to conduct an informed review of a State's demonstration of "necessary assurances" of adequate legal authority, and as not requiring approval of the statutory provisions themselves as part of the SIP.

Lastly, the District points to EPA's own description of the Agency's approval of the revised legal authority chapter as "nonsignificant" and "administrative in nature" as inconsistent with EPA's contention that the approval of the revised legal authority chapter superseded the earlier chapter and related statutory provisions given the significance that the District attaches to the supersession of those provisions. However, EPA's description of its action approving the revised legal authority chapter as "administrative" mirrors ARB's foreword to the revised legal authority chapter: "Chapter 3 is an Air Resources Board (ARB) revision to the State of California Implementation Plan for the Attainment and Maintenance of Ambient Air Quality Standards (SIP). It is an administrative chapter which outlines the State's legal authority to implement the measures contained in the State Implementation Plan required by the Clean Air Act * * *." Our approval action was thus

consistent with ARB's description of the revised legal authority action.

Retention of the statutory provisions that had been submitted as part of the original SIP would imply that they have significance outside of their purpose in providing support for the State's "necessary assurances" of adequate legal authority, which ARB submitted in the form of a narrative chapter. But, ARB's description of the chapter itself as "administrative" shows that the underlying statutory provisions have no place in the applicable SIP other than with the demonstration of "necessary assurances." Our conclusion that the statutes submitted in support of the original chapter were superseded upon our approval of the revised chapter is consistent with this understanding of the inherent connection between the "necessary assurances" demonstration in the SIP and the supporting statutory provisions.

As described above, the statutes submitted by a State in support of the "necessary assurances" demonstration of adequate legal authority may be approved as part of the SIP (*e.g.,* original California SIP) but are not required to be part of the SIP. Where EPA has approved the supporting statutes into the SIP, EPA views the statutes as "nonregulatory" provisions of the SIP. *See, e.g.,* 62 FR 27968, at 27971 (May 22, 1997) ("Examples of nonregulatory SIP provisions include, but are not limited to, the following subject matter: SIP narratives * * * State Statutes * * *."); and again in 72 FR 64158, at 64160 (November 15, 2007) ("EPA-approved non-regulatory control measures include * * * State statutes * * * which have been submitted for inclusion in the SIP by the State. * * * Examples of EPA-approved documents and materials associated with the SIP include, * * * State Statutes submitted for the purposes of demonstrating legal authority; * * *."). ARB's and EPA's description of the revised legal authority chapter of the California SIP as "administrative" is consistent with the idea that even if the supporting statutes had been approved into the SIP in 1980 (which they were not), EPA would have categorized the statutes as "nonregulatory."

The statutes are considered "nonregulatory" because statutes that provide State or local administrative agencies with the authority to establish regulatory requirements do not in themselves establish the requirements. Rather, the rules promulgated under the relevant authorities establish the requirements. In this instance, such rules have included permitting rules that were adopted by the individual county-based air districts in San Joaquin Valley (and later by the San Joaquin Valley Unified Air Pollution Control District) exempting agricultural sources, that were approved by EPA as part of the San Joaquin Valley portion of the California SIP, and that continued in effect in the SIP until 2004, notwithstanding the supersession of the underlying statutory provision back in 1980. Hence, EPA's description of the Agency's approval of the revised legal authority chapter as being "nonsignificant," because no new requirements would be imposed nor would any requirements be withdrawn, is correct. Such requirements are not established in the statutes providing the legal authorities, but are found in the approved State and local district rules.[5]

Comment #5: The District states that the agricultural permitting exemption was removed from State law in 2003 as it relates to major sources, but states that the change in State law was never submitted to EPA as a SIP revision and thus the agricultural permitting exemption remains in the SIP.

Response #5: We agree that the State law replacing the full agricultural permitting exemption with a limited permitting exemption for certain minor agricultural sources (Senate Bill 700) has never been submitted to EPA as a SIP revision. However, as we clarify through this final rule, California did not need to submit SB 700 to EPA as a SIP revision to remove the agricultural permitting exemption from the SIP because it was removed from the California SIP upon the effective date of our 1980 final rule approving the State's revision to the legal authority chapter of the California SIP.

Comment #6: The District contends that Clean Air Act section 301(a)(1) does not authorize EPA to unilaterally amend the agricultural exemption out of the California SIP.

Response #6: We agree that CAA section 301(a)(1) does not authorize EPA to unilaterally amend the SIP. To amend the SIP, EPA is authorized to take action under CAA section 110. For instance, our action in 1980 to approve California's revised legal authority chapter of the California SIP was an action taken by EPA under section 110. We do not view our action today as amending the California SIP. Our view as expressed in the proposed rule and in responses to comments above is that we are simply clarifying the effect of a previous rulemaking. We are taking this action to avoid further confusion as to the current status of the statutory provisions (such as the agricultural permitting exemption) submitted as part of the original 1972 California SIP.

CAA section 301(a) authorizes EPA to prescribe such regulations as are necessary to carry out the Agency's functions under the CAA. One of the basic functions of the Agency under the CAA is to take actions on SIPs and SIP revisions (*See* section 110(k)), and in doing so, we are responsible for ensuring that the regulatory effect of our action is clearly set forth through rules published in the **Federal Register** and that our codification of SIP approvals in 40 CFR part 52 reasonably identifies the approved provisions.

In this instance, we have discovered that our 1979 proposed rule and 1980 final rule approving a revision to the California SIP did not clearly identify the materials being superseded, and we appropriately rely upon our rulemaking authority under CAA section 301(a) to clarify the superseding effect of our 1980 action. In so doing, we are not amending the California SIP, but merely clarifying what the current SIP includes, or to be more specific, what the current SIP does not include.

Comment #7: Dairy Cares notes that, in 2004, EPA undertook a rulemaking to remove from the SIP several specific statutes that were included in the 1972 original California SIP, and claims that such action would have been unnecessary if the statutory provision submitted with the original California SIP had been superseded by EPA's approval action on the revised legal authority chapter of the California SIP in 1980. Dairy Cares asserts that EPA's action in 2004 reveals the Agency's understanding then that the statutory provisions from the original California SIP remain in the SIP, and concludes that there is simply no way to reconcile EPA's actions in 2004 with the action it now proposes as they are entirely inconsistent.

Response #7: In our January 29, 2010 proposed rule, we recognize that our 2004 rulemaking (69 FR 67062, November 16, 2004) removed certain variance-related statutory provisions from the California SIP. *See* 75 FR at 4742, at 4744. We agree that our conclusion in the current rulemaking that all of the statutory provisions submitted in connection with the legal

[5] The District refers to 40 CFR 52.220(b)(12)(i) as an instance where California removed certain sections of the CH&SC approved in 1972 from the California SIP. California did not remove these CH&SC sections; EPA did so under the error correction authority of CAA section 110(k)(6). *See* 69 FR 67062 (November 16, 2004). We now recognize that we did not need to do so, since all of the statutory provisions submitted in support of the original legal authority chapter of the SIP had been superseded by our approval of the revised legal authority chapter in 1980. *See* response to comment #7.

authority chapter of the original California SIP were superseded in 1980 is not consistent with our 2004 rulemaking. We also agree that, if all of the statutory provisions in question had been superseded in 1980, then removal of the specific variance-related provisions in 2004 would not have been necessary.

Upon review of the 2004 rulemaking, however, we find no evidence of the type of detailed research into the contents of the California SIP that was conducted for this rulemaking. Furthermore, we believe that the Agency's own mistaken understanding in 2004 of the status of the variance-related statutory provisions simply highlights the need for the Agency to take some action, such as the one taken today, to clarify the status of the statutory provisions and other legal documents submitted in support of the legal authority chapter of the original California SIP. As described above, we have the authority under CAA section 301(a) to identify the superseding effect of a prior rulemaking (in this case, a rulemaking in 1980) and to thereby clarify the contents of the current California SIP.

III. Final Action

None of the comments have caused us to modify our proposed rule, and thus, under CAA section 301(a)(1) and for the reasons discussed in the proposed rule and in this final rule, EPA is taking final action to clarify that the statutory provisions and other legal documents approved in connection with the legal authority chapter of the original 1972 California SIP were superseded in the California SIP by EPA's approval of a revised legal authority chapter in 1980 (and codified at 40 CFR 52.220(c)(48)). We are memorializing our interpretation of the effect of the 1980 final rule by revising the relevant provision in 40 CFR 52.220 accordingly.

IV. Statutory and Executive Order Reviews

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (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. section 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 rule 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. section 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 July 19, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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, Incorporation by reference, Intergovernmental relations, Oxides of nitrogen, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: May 5, 2010.

Jared Blumenfeld,

Regional Administrator, Region IX.

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations 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 F—California

■ 2. Section 52.220 is amended by revising paragraph (b)(12)(i) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(b) * * *

(12) * * *

(i) Previously approved on May 31, 1972 in paragraph (b) and deleted without replacement, effective September 10, 1980, chapter 7 ("Legal Considerations") of part I ("State General Plan") of the plan submitted on February 21, 1972, and all of the statutory provisions and other legal documents contained in appendix II ("State Statutes and other Legal Documents Pertinent to Air Pollution Control in California") to chapter 7.

* * * * *

[FR Doc. 2010–11867 Filed 5–18–10; 8:45 am]

BILLING CODE 6560–50–P

NORTH CAROLINA DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES
PUBLIC NOTICE

PURPOSE:

The North Carolina Department of Environment and Natural Resources, Division of Air Quality (NCDAQ) hereby gives notice regarding its Certification of Clean Air Act Section 110(a)(1) and (2) Requirements for the 2010 1-Hour Nitrogen Dioxide (NO_2) National Ambient Air Quality Standards. The certification describes basic program "infrastructure" elements that address the provisions of Section 110(a)(1) and (2). The certification once finalized will be submitted to the United States Environmental Protection Agency to be included in the State Implementation Plan as required by the Clean Air Act. Persons wishing to submit comments or request a public hearing regarding the certification are invited to do so.

COMMENT PROCEDURES:

Any person wishing to comment may submit a written statement for inclusion in the record of proceedings regarding the Certification of Clean Air Act Section 110(a)(1) and (2) Requirements for 2010 1-Hour NO_2 standards.
Written comments should be received by no later than August 12, 2013.

REQUESTS FOR A PUBLIC HEARING:

Requests for a public hearing must be in writing and include a statement supporting the need for such a hearing, an indication of your interest in the subject, and a brief summary of the information intended to be offered at such hearing. A public hearing will be scheduled if requested. A separate notice will be announced for the hearing including the date, time and location. Written requests for a public hearing should be received no later than August 12, 2013 and addressed to Sushma Masemore, Division of Air Quality, 1641 Mail Service Center, Raleigh, North Carolina 27699-1641.

INFORMATION:

Comments can be submitted electronically to the following:
daq.publiccomments@ncdenr.gov
(Please type "NO_2 Infrastructure SIP" in the subject line)
Comments can be mailed to:
Sushma Masemore
NC Division of Air Quality
1641 Mail Service Center
Raleigh, NC 27699-1641
Comments can be FAXed to the attention of Sushma Masemore:
(919) 707-8700

Copies of the certification may be downloaded from the NCDAQ web site at http://www.ncair.org/planning/nc_sip.shtml

The certification may be reviewed in person during normal business hours at the following North Carolina Department of Environment and Natural Resources, Division of Air Quality offices:

Raleigh Central Office, Planning Section	919-707-8404		
Asheville	828/296-4500	Fayetteville	910/433-3300
Mooresville	704/663-1699	Raleigh	919/791-4200
Washington	252/946-6481	Wilmington	910/796-7215
Winston-Salem	336/771-5000		

Date: 7/8/2013

Sheila C. Holman, Director

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

August 12, 2013

Ms. Sheila C. Holman, Director
Division of Air Quality
North Carolina Department of
Environment and Natural Resources
1641 Mail Service Center
Raleigh, North Carolina 27699-1641

Dear Ms. Holman:

Thank you for your letter dated July 8, 2013, transmitting a prehearing package regarding the infrastructure requirements to meet Clean Air Act (CAA) sections 110(a)(1) and (2) for the 2010 1-hour Nitrogen Dioxide (NO_2) national ambient air quality standards (NAAQS). We have completed our review of the prehearing submittal and offer the following comments in the enclosure.

We look forward to continuing to work with you and your staff. If you have any questions, please contact Ms. Lynorae Benjamin, Chief, Regulatory Development Section at (404) 562-9040, or have your staff contact Nacosta C. Ward at (404) 562-9140.

Sincerely,

R. Scott Davis
Chief
Air Planning Branch

Enclosure

Enclosure - Comments on the Infrastructure Requirements for CAA Sections 110(a)(1) and (2) for the 2010 1-hour NO_2 NAAQS

110(a)(2)(C),(D)(i) and (J)

- At this time, the North Carolina Department of Environment and Natural Resources (NC DENR) has made a submission for three of the four prevention of significant deterioration (PSD) requirements to comply with the PSD portion of sections 110(a)(2)(C),(D)(i) and (J). EPA suggests that NC DENR reword the sentence "All PSD requirements have either been approved by the USEPA for North Carolina or have been submitted for approval to the USEPA" as these requirements have not all been approved and/or submitted. The EPA anticipates NC DENR's submission for the outstanding PSD requirements in September 2013. This includes all relevant provisions associated with the implementation of the $PM_{2.5}$ PSD increments as promulgated in the $PM_{2.5}$ PSD Increments-SILs-SMC Rule on October 20, 2010.

- Under Subsection 2(D)(II) and 110(a)(2)(J) the EPA suggests NC DENR use consistent language referenced at 110(a)(2)(C) when addressing compliance with PSD.

110(a)(2)(E)(ii)

- On February 5, 2013, NC DENR submitted a state implementation plan (SIP) revision to the EPA to meet the requirements for section 110(a)(2)(E)(ii) related to section 128 for the 1997 8-hour ozone NAAQS. At this time, the EPA is currently evaluating this submission. Final EPA action on these requirements will determine if the February 5, 2013, SIP revision fully satisfies the section 110(a)(2)(E)(ii) requirements for the 1997 8-hour ozone and subsequent NAAQS that have been certified by NC DENR.