

Attachment 2

North Carolina General Statutes

Referenced in the North Carolina Certification for

Clean Air Act Section 110(a)(1) and (2)

2008 Lead Requirements

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This document contains the North Carolina General Statutes (NCGS) that supports North Carolina's certification for Clean Air Act Section 110(a)(1) and (2) requirements for the 2008 lead national ambient air quality standards. Below is a table of contents of the NCGS that were referenced in Attachment 1.

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Chapter 138A.
State Government Ethics Act.
Article 1.
General Provisions.

§ 138A-1. Title.

This Chapter shall be known and may be cited as the "State Government Ethics Act". (2006-201, s. 1.)

§ 138A-2. Purpose.

The purpose of this Chapter is to ensure that elected and appointed State agency officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence. To this end, it is the intent of the General Assembly in this Chapter to ensure that standards of ethical conduct and standards regarding conflicts of interest are clearly established for elected and appointed State agency officials, that the State continually educates these officials on matters of ethical conduct and conflicts of interest, that potential and actual conflicts of interests are identified and resolved, and that violations of standards of ethical conduct and conflicts of interest are investigated and properly addressed. (2006-201, s. 1.)

§ 138A-3. Definitions.

The following definitions apply in this Chapter:

- (1) Blind trust. – A trust established by or for the benefit of a covered person or a member of the covered person's immediate family for divestiture of all control and knowledge of assets. A trust qualifies as a blind trust under this subdivision if the covered person or a member of the covered person's immediate family has no knowledge of the holdings and sources of income of the trust, the trustee of the trust is independent of and not associated with or employed by the covered person or a member of the covered person's immediate family and is not a member of the covered person's extended family, and the trustee has sole discretion as to the management of the trust assets.
- (1c) Board. – Any State board, commission, council, committee, task force, authority, or similar public body, however denominated, created by statute or executive order, as determined and designated by the Commission, except for those public bodies that have only advisory authority.
- (2) Business. – Any of the following organized for profit:
 - a. Association.
 - b. Business trust.
 - c. Corporation.
 - d. Enterprise.
 - e. Joint venture.
 - f. Organization.
 - g. Partnership.
 - h. Proprietorship.
 - i. Vested trust.

- j. Every other business interest, including ownership or use of land for income.
- (3) Business with which associated. – A business in which the covered person or filing person or any member of that covered person's or filing person's immediate family does any of the following:
- a. Is an employee.
 - b. Holds a position as a director, officer, partner, proprietor, or member or manager of a limited liability company, irrespective of the amount of compensation received or the amount of the interest owned.
 - c. Owns a legal, equitable, or beneficial interest of ten thousand dollars (\$10,000) or more in the business or five percent (5%) of the business, whichever is less, other than as a trustee on a deed of trust.
 - d. Is a lobbyist registered under Chapter 120C of the General Statutes.
- For purposes of this subdivision, the term "business" shall not include a widely held investment fund, including a mutual fund, regulated investment company, or pension or deferred compensation plan, if all of the following apply:
- 1. The covered person, filing person, or a member of the covered person's or filing person's immediate family neither exercises nor has the ability to exercise control over the financial interests held by the fund.
 - 2. The fund is publicly traded, or the fund's assets are widely diversified.
- (4) Commission. – The State Ethics Commission.
- (5) Committee. – The Legislative Ethics Committee as created in Part 3 of Article 14 of Chapter 120 of the General Statutes.
- (6) Compensation. – Any money, thing of value, or economic benefit conferred on or received by any covered person or filing person in return for services rendered or to be rendered by that covered person or filing person or another. This term does not include campaign contributions properly received and, reported as required by Article 22A of Chapter 163 of the General Statutes.
- (7) Confidential information. – Information defined as confidential by the law.
- (8) Constitutional officers of the State. – Officers whose offices are established by Article III of the North Carolina Constitution.
- (9) Contract. – Any agreement, including sales and conveyances of real and personal property, and agreements for the performance of services.
- (10) Covered person. – A legislator, public servant, or judicial officer, as identified by the Commission under G.S. 138A-11.
- (11) Repealed by Session Laws 2008-213, s. 84(c), effective August 15, 2008.
- (12) Employing entity. – For public servants, any of the following bodies of State government of which the public servant is an employee or a member, or over which the public servant exercises supervision: agencies, authorities, boards, commissions, committees, councils, departments, offices, institutions and their subdivisions, and constitutional offices of the State. For legislators, it is the house of which the legislator is a member. For legislative employees, it is the

- authority that hired the individual. For judicial employees, it is the Chief Justice.
- (13) Extended family. – Spouse, lineal descendant, lineal ascendant, sibling, spouse's lineal descendant, spouse's lineal ascendant, spouse's sibling, and the spouse of any of these individuals.
- (14) Filing person. – An individual required to file a statement of economic interest under G.S. 138A-22.
- (14a), (14b) Reserved for future codification purposes.
- (14c) Financial benefit. – A direct pecuniary gain or loss to the legislator, the public servant, or a person with which the legislator or public servant is associated, or a direct pecuniary loss to a business competitor of the legislator, the public servant, or a person with which the legislator or public servant is associated.
- (15) Gift. – Anything of monetary value given or received without valuable consideration by or from a lobbyist, lobbyist principal, liaison personnel, or a person described under G.S. 138A-32(d)(1), (2), or (3). The following shall not be considered gifts under this subdivision:
- a. Anything for which fair market value, or face value if shown, is paid by the covered person or legislative employee.
 - b. Commercially available loans made on terms not more favorable than generally available to the general public in the normal course of business if not made for lobbying.
 - c. Contractual arrangements or commercial relationships or arrangements made in the normal course of business if not made for lobbying.
 - d. Academic or athletic scholarships based on the same criteria as applied to the public.
 - e. Anything of value properly reported as required under Article 22A of Chapter 163 of the General Statutes.
 - f. Expressions of condolence related to a death of an individual, sent within a reasonable time of the death, if the expression is one of the following:
 1. A sympathy card, letter, or note.
 2. Flowers.
 3. Food or beverages for immediate consumption.
 4. Donations to a religious organization, charity, the State or a political subdivision of the State, not to exceed a total of two hundred dollars (\$200.00) per death per donor.
- (15a) through (15c) Reserved for future codification purposes.
- (15d) Governmental unit. – A political subdivision of the State, and any other entity or organization created by a political subdivision of the State.
- (16) Honorarium. – Payment for services for which fees are not legally or traditionally required.
- (17) Immediate family. – An unemancipated child of the covered person residing in the household and the covered person's spouse, if not legally separated. A member of a covered person's extended family shall also be considered a member of the immediate family if actually residing in the covered person's household.

- (18) Judicial employee. – The director and assistant director of the Administrative Office of the Courts and any other individual, designated by the Chief Justice, employed in the Judicial Department whose annual compensation from the State is sixty thousand dollars (\$60,000) or more.
- (19) Judicial officer. – Justice or judge of the General Court of Justice, district attorney, clerk of court, or any individual elected or appointed to any of these positions prior to taking office.
- (20) Legislative action. – As the term is defined in G.S. 120C-100.
- (21) Legislative employee. – As the term is defined in G.S. 120C-100.
- (22) Legislator. – A member or presiding officer of the General Assembly, or an individual elected or appointed a member or presiding officer of the General Assembly before taking office.
- (23) Lobbying. – As the term is defined in G.S. 120C-100.
- (24) Nonprofit corporation or organization with which associated. – Any not for profit corporation, organization, or association, incorporated or otherwise, that is organized or operating in the State primarily for religious, charitable, scientific, literary, public health and safety, or educational purposes and of which the covered person, filing person, or any member of the covered person's or filing person's immediate family is a director, officer, governing board member, employee, lobbyist registered under Chapter 120C of the General Statutes, or independent contractor. Nonprofit corporation or organization with which associated shall not include any board, entity, or other organization created by this State or by any political subdivision of this State.
- (25) Official action. – Any decision, including administration, approval, disapproval, preparation, recommendation, the rendering of advice, and investigation, made or contemplated in any proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, investigation, charge, or rule making.
- (26) Participate. – To take part in, influence, or attempt to influence, including acting through an agent or proxy.
- (26c) Permanent designee. – An individual designated by a public servant to serve and vote in the absence of the public servant on a regular basis on a board on which the public servant serves.
- (27) Person. – Any individual, firm, partnership, committee, association, corporation, business, or any other organization or group of persons acting together. The term "person" does not include the State, a political subdivision of the State, a board, or any other entity or organization created by the State or a political subdivision of the State.
- (27a), (27b) Reserved for future codification purposes.
- (27c) Person with which the legislator is associated. – Any of the following:
 - a. A member of the legislator's extended family.
 - b. A client of the legislator.
 - c. A business with which the legislator or a member of the legislator's immediate family is associated.

- d. A nonprofit corporation or association with which the legislator or a member of the legislator's immediate family is associated.
 - e. The State, a political subdivision of the State, a board, or any other entity or organization created by the State or a political subdivision of the State that employs the legislator or a member of the legislator's immediate family.
- (27d) Person with which the public servant is associated. – Any of the following:
- a. A member of the public servant's extended family.
 - b. A client of the public servant.
 - c. A business with which the public servant or a member of the public servant's immediate family is associated.
 - d. A nonprofit corporation or association with which the public servant or a member of the public servant's immediate family is associated.
 - e. The State, a political subdivision of the State, a board, or any other entity or organization created by the State or a political subdivision of the State that employs the public servant or a member of the public servant's immediate family.
- (28) Political party. – Either of the two largest political parties in the State based on statewide voter registration at the applicable time.
- (29) Repealed by Session Laws 2008-213, s. 49, effective August 15, 2008.
- (30) Public servants. – All of the following:
- a. Constitutional officers of the State and individuals elected or appointed as constitutional officers of the State prior to taking office.
 - b. Employees of the Office of the Governor.
 - c. Heads of all principal State departments, as set forth in G.S. 143B-6, who are appointed by the Governor.
 - d. The chief deputy and chief administrative assistant of each individual designated under sub-subdivision a. or c. of this subdivision.
 - e. Confidential assistants and secretaries as defined in G.S. 126-5(c)(2), to individuals designated under sub-subdivision a., c., or d. of this subdivision.
 - f. Employees in exempt positions designated in accordance with G.S. 126-5(d)(1), (2), or (2a) and confidential secretaries to these individuals.
 - g. Any other employees or appointees in the principal State departments as may be designated by the Governor to the extent that the designation does not conflict with the State Personnel Act.
 - h. Judicial employees.
 - i. All voting members of boards, including ex officio members, permanent designees of any voting member, and members serving by executive, legislative, or judicial branch appointment.
 - j. For The University of North Carolina, the voting members of the Board of Governors of The University of North Carolina, the president, the vice-presidents, and the chancellors, the vice-chancellors, and voting members of the boards of trustees of the constituent institutions.

- k. For the Community College System, the voting members of the State Board of Community Colleges, the President and the chief financial officer of the Community College System, the president, chief financial officer, and chief administrative officer of each community college, and voting members of the boards of trustees of each community college.
 - l. Members of the Commission, the executive director, and the assistant executive director of the Commission.
 - m. Individuals under contract with the State working in or against a position included under this subdivision.
 - n. The director of the Office of State Personnel.
 - o. The State Controller.
 - p. The chief information officer, deputy chief information officers, chief financial officers, and general counsel of the Office of Information Technology Services.
 - q. The director of the State Museum of Art.
 - r. The executive director of the Agency for Public Telecommunications.
 - s. The Commissioner of Motor Vehicles.
 - t. The Commissioner of Banks and the chief deputy commissioners of the Banking Commission.
 - u. The executive director of the North Carolina Housing Finance Agency.
 - v. The executive director, chief financial officer, and chief operating officer of the North Carolina Turnpike Authority.
- (30a) through (30j) Reserved for future codification purposes.
- (30k) State agency. – An agency in the executive branch of the government of this State, including the Governor's Office, a board, a department, a division, and any other unit of government in the executive branch.
- (31) Vested trust. – A trust, annuity, or other funds held by a trustee or other third party for the benefit of the covered person or a member of the covered person's immediate family, except a blind trust. A vested trust shall not include a widely held investment fund, including a mutual fund, regulated investment company, or pension or deferred compensation plan, if:
- a. The covered person or a member of the covered person's immediate family neither exercises nor has the ability to exercise control over the financial interests held by the fund; and
 - b. The fund is publicly traded, or the fund's assets are widely diversified. (2006-201, s. 1; 2007-347, ss. 7, 8; 2007-348, ss. 19-26; 2008-187, s. 44; 2008-213, ss. 40-54, 84(c); 2010-169, ss. 10, 17(n), (o); 2010-170, s. 14.)

§ 138A-4. Application to Lieutenant Governor.

For purposes of this Chapter, the Lieutenant Governor shall be considered a legislator when carrying out the Lieutenant Governor's duties under Sec. 13 of Article II of the Constitution, and a public servant for all other purposes. (2006-201, s. 1.)

§ 138A-5. Reserved for future codification purposes.

Article 2.
State Ethics Commission.

§ 138A-6. State Ethics Commission established.

There is established the State Ethics Commission. (2006-201, s. 1.)

§ 138A-7. Membership.

(a) The Commission shall consist of eight members. Four members shall be appointed by the Governor, of whom no more than two shall be of the same political party. Four members shall be appointed by the General Assembly, two upon the recommendation of the Speaker of the House of Representatives, neither of whom shall be of the same political party, and two upon the recommendation of the President Pro Tempore of the Senate, neither of whom shall be of the same political party. Members shall serve for four-year terms, beginning January 1, 2007, except for the initial terms that shall be as follows:

- (1) Two members appointed by the Governor shall serve an initial term of one year.
- (2) Two members appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives and one upon the recommendation of the President Pro Tempore of the Senate, shall serve initial terms of two years.
- (3) Two members appointed by the Governor shall serve initial terms of three years.
- (4) Two members appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives and one member upon the recommendation of the President Pro Tempore of the Senate, shall serve initial terms of four years.

(b) Members shall be removed from the Commission only for misfeasance, malfeasance, or nonfeasance. Members appointed by the Governor may be removed by the Governor. Members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall be removed by the Governor upon the recommendation of the Speaker. Members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate shall be removed by the Governor upon the recommendation of the President Pro Tempore.

(c) Vacancies in appointments made by the Governor shall be filled by the Governor for the remainder of any unfulfilled term. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122 for the remainder of any unfulfilled term.

(d) No member while serving on the Commission or employee while employed by the Commission shall:

- (1) Hold or be a candidate for any other office or place of trust or profit under the United States, the State, or a political subdivision of the State.
- (2) Hold office in any political party above the precinct level.
- (3) Participate in or contribute to the political campaign of any covered person or any candidate for a public office as a covered person over which the Commission would have jurisdiction or authority.
- (4) Otherwise be an employee of the State, a community college, or a local school system, or serve as a member of any other State board.

(e) The Governor shall annually appoint a member of the Commission to serve as chair of the Commission. The Commission shall elect a vice-chair annually from its membership. The vice-chair shall act as the chair in the chair's absence or if there is a vacancy in that position.

(f) Members of the Commission shall receive no compensation for service on the Commission but shall be reimbursed for subsistence, travel, and convention registration fees as provided under G.S. 138-5 or 138-7, as applicable. (2006-201, s. 1.)

§ 138A-8. Meetings and quorum.

The Commission shall meet at least quarterly and at other times as called by its chair or by four of its members. In the case of a vacancy in the chair, meetings may be called by the vice-chair. Five members of the Commission constitute a quorum. (2006-201, s. 1.)

§ 138A-9. Staff and offices.

The Commission may employ professional and clerical staff, including an executive director. The Commission shall be located within the Department of Administration for administrative purposes only, but shall exercise all of its powers, including the power to employ, direct, and supervise all personnel, independently of the Secretary of Administration, and is subject to the direction and supervision of the Secretary of Administration only with respect to the management functions of coordinating and reporting. (2006-201, s. 1.)

§ 138A-10. Powers and duties.

- (a) In addition to other powers and duties specified in this Chapter, the Commission shall:
- (1) Provide reasonable assistance to covered persons in complying with this Chapter.
 - (2) Develop readily understandable forms, policies, and procedures to accomplish the purposes of the Chapter.
 - (3) Identify and publish the following:
 - a. A list of nonadvisory boards.
 - b. The names of individuals subject to this Chapter as covered persons and legislative employees under G.S. 138A-11.
 - (4) Receive and review all statements of economic interests filed with the Commission by prospective and actual covered persons and evaluate whether (i) the statements conform to the law and the rules of the Commission, and (ii) the financial interests and other information reported reveals actual or potential conflicts of interest. Pursuant to G.S. 138A-24(e), this subdivision does not apply to statements of economic interest of legislators and judicial officers.
 - (5) Conduct inquiries of alleged violations against judicial officers, legislators, and legislative employees in accordance with G.S. 138A-12.
 - (6) Conduct inquiries into alleged violations against public servants in accordance with G.S. 138A-12.
 - (7) Render advisory opinions in accordance with G.S. 138A-13 and G.S. 120C-102.
 - (8) Initiate and maintain oversight of ethics educational programs for public servants and their staffs, and legislators and legislative employees, consistent with G.S. 138A-14.

- (9) Conduct a continuing study of governmental ethics in the State and propose changes to the General Assembly in the government process and the law as are conducive to promoting and continuing high ethical behavior by governmental officers and employees.
- (10) Adopt procedures and guidelines to implement this Chapter.
- (11) Report annually to the General Assembly and the Governor on the Commission's activities and generally on the subject of public disclosure, ethics, and conflicts of interest, including recommendations for administrative and legislative action, as the Commission deems appropriate.
- (12) Publish annually statistics on complaints filed with or considered by the Commission, including the number of complaints filed, the number of complaints referred under G.S. 138A-12(b), the number of complaints dismissed under G.S. 138A-12(c)(4), the number of complaints dismissed under G.S. 138A-12(f), the number of complaints referred for criminal prosecution under G.S. 138A-12, the number of complaints dismissed under G.S. 138A-12(h), the number of complaints referred for appropriate action under G.S. 138A-12(h) or G.S. 138A-12(k)(3), and the number and age of complaints pending action by the Commission.
- (13) Perform other duties as may be necessary to accomplish the purposes of this Chapter.

(b) The Commission may authorize the Executive Director and other staff of the Commission to evaluate statements of economic interest on behalf of the Commission as authorized under subdivision (a)(4) of this section.

(c) Except as otherwise provided in this Chapter, the Commission shall be the sole State agency with authority to determine compliance with or violations of this Chapter and to issue interpretations and advisory opinions under this Chapter. Decisions and advisory opinions by the Commission under this Chapter shall be binding on all other State agencies. (2006-201, s. 1; 2008-213, s. 55; 2008-215, s. 7; 2009-549, s. 8.)

§ 138A-11. Identify and publish names of covered persons and legislative employees.

The Commission shall identify and publish at least quarterly a listing of the names and positions of all individuals subject to this Chapter as covered persons or legislative employees. The Commission shall also identify and publish at least annually a listing of all boards to which this Chapter applies. This listing may be published electronically on a public Internet Web site maintained by the Commission. (2006-201, s. 1; 2008-213, s. 56.)

§ 138A-12. Inquiries by the Commission.

(a) Jurisdiction. – The Commission may receive complaints alleging unethical conduct by covered persons and legislative employees and shall conduct inquiries of complaints alleging unethical conduct by covered persons and legislative employees, as set forth in this section.

(a1) Notice of Allegation. – Upon receipt by the Commission of a written allegation of unethical conduct by a covered person or legislative employee, or the initiation by the Commission of an inquiry into unethical conduct under subsection (b) of this section, the Commission shall immediately notify the covered person or legislative employee subject to the allegation or inquiry in writing.

(b) Institution of Proceedings. – On its own motion, in response to a signed and sworn complaint of any individual filed with the Commission, or upon the written request of any public servant or those responsible for the hiring, appointing, or supervising of a public servant, the Commission shall conduct an inquiry into any of the following:

- (1) The application or alleged violation of this Chapter.
- (2) For legislators, the application or alleged violations of Part 1 of Article 14 of Chapter 120 of the General Statutes.
- (3) An alleged violation of the criminal law by a covered person in the performance of that individual's official duties.
- (4) An alleged violation of G.S. 126-14.

Upon receipt of a referral under G.S. 147-64.6B or a report under G.S. 147-64.6(c)(19), the Commission may conduct an inquiry under this section on its own motion. Allegations of violations of the Code of Judicial Conduct shall be referred to the Judicial Standards Commission without investigation.

(b1) Complaints on Its Own Motion. – An investigation initiated by the Commission on its own motion or upon written request of any public servant or those responsible for the hiring, appointing, or supervising of a public servant instituted under subsection (b) of this section shall be treated as a complaint for purposes of this section and need not be sworn or verified.

(c) Complaint. –

- (1) A sworn complaint filed under this Chapter shall state the name, address, and telephone number of the individual filing the complaint, the name and job title or appointive position of the covered person or legislative employee against whom the complaint is filed, and a concise statement of the nature of the complaint and specific facts indicating that a violation of this Chapter or Chapter 120 of the General Statutes or G.S. 126-14 or the criminal law in the performance of that individual's official duties has occurred, the date the alleged violation occurred, and either (i) that the contents of the complaint are within the knowledge of the individual verifying the complaint, or (ii) the basis upon which the individual verifying the complaint believes the allegations to be true.
- (2) Except as provided in subsection (d) of this section, a complaint filed under this Chapter must be filed within two years of the date the complainant knew or should have known of the conduct upon which the complaint is based.
- (3) The Commission may decline to accept, refer, or conduct an inquiry into any complaint that does not meet all of the requirements set forth in subdivision (1) of this subsection, or the Commission may, in its sole discretion, request additional information to be provided by the complainant within a specified period of time of no less than five business days.
- (4) In addition to subdivision (3) of this subsection, the Commission may decline to accept, refer, or conduct an inquiry into a complaint if it determines that any of the following apply:
 - a. The complaint is frivolous or brought in bad faith.
 - b. The covered person or legislative employee and conduct complained of have already been the subject of a prior complaint.

c. The conduct complained of is primarily a matter more appropriately and adequately addressed and handled by other federal, State, or local agencies or authorities, including law enforcement authorities. If other agencies or authorities are conducting an investigation of the same actions or conduct involved in a complaint filed under this section, the Commission may stay its complaint inquiry pending final resolution of the other investigation.

(5) The Commission shall send a copy of the complaint to the covered person or legislative employee who is the subject of the complaint and the employing entity, within 10 business days of the filing.

(d) Conduct of Inquiry of Complaints by the Commission. – The Commission shall conduct an inquiry into all complaints properly before the Commission in a timely manner. The Commission shall initiate an inquiry into a complaint within 10 business days of the filing of the complaint. The Commission is authorized to initiate inquiries upon request of any member of the Commission if there is reason to believe that a covered person or legislative employee has or may have violated this Chapter. Commission-initiated complaint inquiries under this section shall be initiated within two years of the date the Commission knew of the conduct upon which the complaint is based, except when the conduct is material to the continuing conduct of the duties in office. In determining whether there is reason to believe that a violation has or may have occurred, a member of the Commission may take general notice of available information even if not formally provided to the Commission in the form of a complaint. The Commission may utilize the services of a hired investigator when conducting inquiries.

(e) Covered Person and Legislative Employees Cooperation With Inquiry. – Covered persons and legislative employees shall promptly and fully cooperate with the Commission in any Commission-related inquiry. Failure to cooperate fully with the Commission in any inquiry shall be grounds for sanctions as set forth in G.S. 138A-45.

(f) Dismissal of Complaint After Preliminary Inquiry. – The Commission shall conclude the preliminary inquiry within 20 business days. The Commission shall dismiss the complaint, if at the end of its preliminary inquiry the Commission determines that any of the following apply:

(1) The individual who is the subject of the complaint is not a covered person or legislative employee subject to the Commission's jurisdiction and authority under this Chapter.

(2) The complaint does not allege facts sufficient to constitute a violation within the jurisdiction of the Commission under subsection (b) of this section.

(3) The complaint is determined to be frivolous or brought in bad faith.

(g) Commission Inquiries. – If at the end of its preliminary inquiry, the Commission determines to proceed with further inquiry into the conduct of a covered person or legislative employee, the Commission shall provide written notice to the individual who filed the complaint and the covered person or legislative employee as to the fact of the inquiry and the charges against the covered person or legislative employee. The covered person or legislative employee shall be given an opportunity to file a written response with the Commission.

(h) Action on Inquiries. – The Commission shall conduct inquiries into complaints to the extent necessary to either dismiss the complaint for lack of probable cause of a violation under this section, or:

- (1) For public servants, decide to proceed with a hearing under subsection (i) of this section.
 - (2) For legislators, except the Lieutenant Governor, refer the complaint to the Committee.
 - (3) For judicial officers, refer the complaint to the Judicial Standards Commission for complaints against justices and judges, to the senior resident superior court judge of the district or county for complaints against district attorneys, or to the chief district court judge for the district or county for complaints against clerks of court.
 - (4) For legislative employees, refer the complaint to the employing entity.
- (i) Hearing. –
- (1) The Commission shall give full and fair consideration to all complaints received against a public servant. If the Commission determines that the complaint cannot be resolved without a hearing, or if the public servant requests a hearing, a hearing shall be held.
 - (2) The Commission shall send a notice of the hearing to the complainant, and the public servant. The notice shall contain the time and place for a hearing on the matter, which shall begin no less than 30 days and no more than 90 days after the date of the notice.
 - (3) The Commission shall make available to the public servant or that public servant's private legal counsel all documents or other evidence which are intended to be presented at the hearing to the Commission or which a reasonable person would believe might exculpate the accused public servant at least 30 days prior to the date of the hearing held in connection with the investigation of a complaint. Any documents or other evidence discovered within less than 30 days of the hearing shall be furnished as soon as possible after discovery but prior to the hearing.
 - (4) At any hearing held by the Commission:
 - a. Oral evidence shall be taken only on oath or affirmation.
 - b. The hearing shall be open to the public, except for matters involving minors, personnel records, or matters that could otherwise be considered in closed session under G.S. 143-318.11. In any event, the deliberations by the Commission on a complaint may be held in closed session.
 - c. The public servant being investigated shall have the right to present evidence, call and examine witnesses, cross-examine witnesses, introduce exhibits, and be represented by counsel.
- (j) Settlement of Inquiries. – The public servant who is the subject of the complaint and the staff of the Commission may meet by mutual consent before the hearing to discuss the possibility of settlement of the inquiry or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the inquiry is subject to the approval of the Commission.
- (k) Disposition of Inquiries. – After hearing, the Commission shall dispose of the matter in one or more of the following ways:

- (1) If the Commission finds substantial evidence of an alleged violation of a criminal statute, the Commission shall refer the matter to the Attorney General for investigation and referral to the district attorney for possible prosecution.
- (2) If the Commission finds that the alleged violation is not established by clear and convincing evidence, the Commission shall dismiss the complaint.
- (3) If the Commission finds that the alleged violation of this Chapter is established by clear and convincing evidence, the Commission shall do one or more of the following:
 - a. Issue a private admonishment to the public servant and notify the employing entity, if applicable. Such notification shall be treated as part of the personnel record of the public servant.
 - b. Refer the matter for appropriate action to the Governor and the employing entity that appointed or employed the public servant or of which the public servant is a member.
 - c. Refer the matter for appropriate action to the Chief Justice for judicial employees.
 - d. Refer the matter to the Principal Clerks of the House of Representatives and Senate of the General Assembly for constitutional officers of the State.
 - e. Refer the matter for appropriate action to the principal clerk of the house of the General Assembly that elected the public servant for members of the Board of Governors and the State Board of Community Colleges.

(l) Notice of Dismissal. – Upon the dismissal of a complaint under this section, the Commission shall provide written notice of the dismissal to the individual who filed the complaint and the covered person or legislative employee against whom the complaint was filed. The Commission shall forward copies of complaints and notices of dismissal of complaints against legislators to the Committee, against legislative employees to the employing entity for legislative employees, and against judicial officers to the Judicial Standards Commission for complaints against justices and judges, and the senior resident superior court judge of the district or county for complaints against district attorneys, or the chief district court judge of the district or county for complaints against clerks of court. The Commission shall also forward a copy of the notice of dismissal to the employing entity of the covered person against whom a complaint was filed if the employing entity received a copy of the complaint under subdivision (5) of subsection (c) of this section. Except as provided in subsection (n) of this section, the complaint and notice of dismissal are confidential and not public records.

(m) Reports and Records. – The Commission shall render the results of its inquiry in writing. When a matter is referred under subdivision (h)(2) and (3), or subsection (k) of this section, the Commission's report shall consist of the complaint, response, and detailed results of its inquiry in support of the Commission's finding of a violation under this Chapter.

(n) Confidentiality. – Complaints and responses filed with the Commission and reports and other investigative documents and records of the Commission connected to an inquiry under this section, including information provided pursuant to G.S. 147-64.6B or G.S. 147-64.6(c)(19), shall be confidential and not matters of public record, except as otherwise provided in this section or when the covered person or legislative employee under inquiry requests in writing that the complaint, response, and findings be made public. Once a hearing under this section commences, the complaint, response, and all other documents offered at the hearing in

conjunction with the complaint, not otherwise privileged or confidential under law, shall be public records. If no hearing is held at such time as the Commission reports to the employing entity a recommendation of sanctions, the complaint and response shall be made public.

(o) Recommendations of Sanctions. – After referring a matter under subsection (k) of this section, if requested by the entity to which the matter was referred, the Commission may recommend sanctions or issue rulings as it deems necessary or appropriate to protect the public interest and ensure compliance with this Chapter. In recommending appropriate sanctions, the Commission may consider the following factors:

- (1) The public servant's prior experience in an agency or on a board and prior opportunities to learn the ethical standards for a public servant as set forth in Article 4 of this Chapter, including those dealing with conflicts of interest.
- (2) The number of ethics violations.
- (3) The severity of the ethics violations.
- (4) Whether the ethics violations involve the public servant's financial interest.
- (5) Whether the ethics violations were inadvertent or intentional.
- (6) Whether the public servant knew or should have known that the improper conduct was a violation of this Chapter.
- (7) Whether the public servant has previously been advised or warned by the Commission.
- (8) Whether the conduct or situation giving rise to the ethics violation was pointed out to the public servant in the Commission's Statement of Economic Interest evaluation letter issued under G.S. 138A-24(e).
- (9) The public servant's motivation or reason for the improper conduct or action, including whether the action was for personal financial gain versus protection of the public interest.

In making recommendations under this subsection, if the Commission determines, after proper review and investigation, that sanctions are appropriate, the Commission may recommend any action it deems necessary to properly address and rectify any violation of this Chapter by a public servant, including removal of the public servant from the public servant's State position. Nothing in this subsection is intended, and shall not be construed, to give the Commission any independent civil, criminal, or administrative investigative or enforcement authority over covered persons, or other State employees or appointees.

(p) Authority of Employing Entity. – Any action or failure to act by the Commission under this Chapter, except G.S. 138A-13, shall not limit any authority of any of the applicable employing entities to discipline the covered person or legislative employee.

(q) Continuing Jurisdiction. – The Commission shall have continuing jurisdiction to investigate possible criminal violations of this Chapter for a period of one year following the date an individual, who was formerly a public servant or legislative employee, ceases to be a public servant or legislative employee for any investigation that commenced prior to the date the public servant or legislative employee ceases to be a public servant or legislative employee.

(r) Subpoena Authority. – The Commission may petition the Superior Court of Wake County for the approval to issue subpoenas and subpoenas duces tecum as necessary to conduct investigations of alleged violations of this Chapter. The court shall authorize subpoenas under this subsection when the court determines the subpoenas are necessary for the enforcement of this Chapter. Subpoenas issued under this subsection shall be enforceable by the court through

contempt powers. Venue shall be with the Superior Court of Wake County for any person or governmental unit covered by this Chapter, and personal jurisdiction may be asserted under G.S. 1-75.4.

(s) Reports. – The number of complaints referred under this section shall be reported under G.S. 138A-10(a)(12).

(t) Concurrent Jurisdiction. – Nothing in this section shall limit the jurisdiction of the Committee or the Judicial Standards Commission with regards to legislative or judicial misconduct, and jurisdiction under this section shall be concurrent with the jurisdiction of the Committee and the Judicial Standards Commission. (2006-201, s. 1; 2007-348, ss. 27-30; 2008-187, s. 21; 2008-213, ss. 1(b), 57; 2008-215, ss. 4, 5; 2009-549, ss. 9, 10, 11; 2010-169, s. 23(a)-(e), (h).)

§ 138A-13. Request for advice.

(a) At the request of any public servant or legislative employee, any individual who is responsible for the supervision or appointment of a public servant or legislative employee, legal counsel for any public servant or legislative employee, any ethics liaison under G.S. 138A-14, or any member of the Commission, the Commission shall render advice on specific questions involving the meaning and application of this Chapter and the public servant's or legislative employee's compliance therewith. Requests for advice and advice rendered in response to those requests shall relate prospectively to real or reasonably anticipated fact settings or circumstances.

(a1) On its own motion, the Commission may render advisory opinions on specific questions involving the meaning and application of this Chapter.

(a2) A request for a formal advisory opinion under subsection (a) of this section shall be in writing, electronic or otherwise. The Commission shall issue formal advisory opinions having prospective application only. A public servant or legislative employee who relies upon the advice provided to that public servant or legislative employee on a specific matter addressed by the requested formal advisory opinion shall be immune from all of the following:

- (1) Investigation by the Commission, except for an inquiry under G.S. 138A-12(b)(3).
- (2) Any adverse action by the employing entity.
- (3) Investigation by the Secretary of State.

(b) At the request of a legislator, the Commission shall render advice on specific questions involving the meaning and application of this Chapter and Part 1 of Article 14 of Chapter 120 of the General Statutes, and the legislator's compliance therewith. Requests for advice and advice rendered in response to those requests shall relate prospectively to real or reasonably anticipated fact settings or circumstances.

(b1) A request by a legislator for a recommended formal advisory opinion shall be in writing, electronic or otherwise. The Commission shall issue recommended formal advisory opinions having prospective application only. Until action is taken by the Committee under G.S. 120-104, a legislator who relies upon the advice provided to that legislator on a specific matter addressed by the requested recommended formal advisory opinion shall be immune from all of the following:

- (1) Investigation by the Committee or Commission, except for an inquiry under G.S. 138A-12(b)(3).
- (2) Any adverse action by the house of which the legislator is a member.
- (3) Investigation by the Secretary of State.

Any recommended formal advisory opinion issued to a legislator under this subsection shall immediately be delivered to the chairs of the Committee, together with a copy of the request. Except for the Lieutenant Governor, the immunity granted under this subsection shall not apply after the time the Committee modifies or overturns the advisory opinion of the Commission in accordance with G.S. 120-104.

(b2) At the request of the Auditor, the Commission shall render advisory opinions on specific questions involving the meaning and application of this Chapter, Article 14 of Chapter 120 of the General Statutes, and Chapter 120C of the General Statutes and an affected person's compliance therewith. The request shall be in writing, electronic or otherwise, and relate to real fact settings and circumstances. Except when the question involves a question governed by subsection (b) or (b1) of this section, the Commission shall issue an advisory opinion under this subsection within 60 days of the receipt of all information deemed necessary by the Commission to render an opinion. If the question involves a question governed by subsection (b) or (b1) of this section, the Commission shall comply with the provisions of that section prior to responding to the Auditor by delivering the recommended advisory opinion to the Committee within 60 days of the receipt of all information deemed necessary by the Commission to render an opinion. The Committee shall act on the opinion within 30 days of receipt and the Commission shall deliver the opinion to the Auditor. If the Committee fails to act on a recommended advisory opinion under this subsection with 30 days of receipt, the Commission shall deliver its recommended advisory opinion to the Auditor. Notwithstanding G.S. 138A-13(e), the Auditor may only release those portions of the advisory opinion necessary to comply with the requirements of G.S. 147-64.6(c)(1).

(c) Staff to the Commission may issue advice, but not formal or recommended formal advisory opinions, under procedures adopted by the Commission.

(d) The Commission shall publish its formal advisory opinions within 30 days of issuance. These formal advisory opinions shall be edited for publication purposes as necessary to protect the identities of the individuals requesting formal advisory opinions. When the Commission issues a recommended formal advisory opinion to a legislator under subsection (b1) of this section, the Commission shall publish only the edited formal advisory opinion of the Committee within 30 days of receipt of the edited opinion from the Committee.

(e) Except as provided under subsections (b2), (d) and (e1) of this section, a request for advice, any advice provided by Commission staff, any formal or recommended formal advisory opinions, any supporting documents submitted or caused to be submitted to the Commission or Commission staff, and any documents prepared or collected by the Commission or Commission staff in connection with a request for advice are confidential. The identity of the individual making the request for advice, the existence of the request, and any information related to the request may not be revealed without the consent of the requestor. An individual who requests advice or receives advice, including a formal or recommended formal advisory opinion, may authorize the release to any other person, the State, or any governmental unit of the request, the advice, or any supporting documents.

For purposes of this section, "document" is as defined in G.S. 120-129. Requests for advice, any advice, and any documents related to requests for advice are not "public records" as defined in G.S. 132-1.

(e1) Staff to the Commission may share all information and documents related to requests for advice, made by legislators under this section with staff to the Committee. The information and

documents in the possession of staff to the Committee are confidential and are not public records.

(f) This section shall apply to judicial officers only for advice related to Article 3 of this Chapter.

(g) Requests for advice may be withdrawn by the requestor at any time prior to the issuance of the advice. (2006-201, s. 1; 2007-348, s. 31; 2008-213, ss. 2(b), 91.5; 2008-215, s. 6; 2009-570, s. 17; 2010-169, s. 17(p).)

§ 138A-14. Ethics education program.

(a) The Commission shall develop and implement an ethics education and awareness program designed to instill in all covered persons and their immediate staffs, and legislative employees, a keen and continuing awareness of their ethical obligations and a sensitivity to situations that might result in real or potential conflicts of interest.

(b) The Commission shall offer basic ethics education and awareness presentations to all public servants and their immediate staffs, upon their election, appointment, or employment, and shall offer periodic refresher presentations as the Commission deems appropriate. Every public servant shall participate in an ethics presentation approved by the Commission within six months of the public servant's election, reelection, appointment, or employment, and shall attend refresher ethics education presentations at least every two years thereafter in a manner as the Commission deems appropriate.

(b1) A public servant appointed to a board determined and designated as nonadvisory under G.S. 138A-10(a)(3) shall attend an ethics presentation approved by the Commission within six months of notification of the designation by the Commission and at least every two years thereafter in a manner as the Commission deems appropriate.

(c) The Commission, jointly with the Committee, shall make basic ethics education and awareness presentations to all legislators and legislative employees upon their election, reelection, appointment, or employment and shall offer periodic refresher presentations as the Commission and the Committee deem appropriate. Every legislator shall participate in an ethics presentation approved by the Commission and Committee within two months of either the convening of the General Assembly to which the legislator is elected or within two months of the legislator's appointment, whichever is later. Every legislative employee shall participate in an ethics presentation approved by the Commission and Committee within three months of employment, and shall attend refresher ethics education presentations at least every two years thereafter, in a manner as the Commission and Committee deem appropriate.

(d) Upon request, the Commission shall assist each agency in developing in-house education programs and procedures necessary or desirable to meet the agency's particular needs for ethics education, conflict identification, and conflict avoidance.

(e) Each agency head shall designate an ethics liaison who shall maintain active communication with the Commission on all agency ethical issues. The ethics liaison shall attend ethics education and awareness programs as provided under this section and lobbying education and awareness programs as provided under G.S. 120C-103 and continuously assess and advise the Commission of any issues or conduct which might reasonably be expected to result in a conflict of interest and seek advice and rulings from the Commission as to their appropriate resolution.

(f) The Commission shall publish a newsletter containing summaries of the Commission's opinions, policies, procedures, and interpretive bulletins as issued from time to time. The newsletter shall be distributed to all covered persons and legislative employees. Publication under this subsection may be done electronically.

(g) The Commission shall assemble and maintain a collection of relevant State laws, rules, and regulations that set forth ethical standards applicable to covered persons. This collection shall be made available electronically as resource material to public servants, and ethics liaisons, upon request.

(h) Repealed by Session Laws 2009-549, s. 12, effective August 28, 2009.

(i) This section shall not apply to judicial officers. (2006-201, s. 1; 2007-347, s. 9(a); 2008-213, ss. 59, 60; 2009-10, s. 4; 2009-549, s. 12; 2010-169, s. 22(a).)

§ 138A-15. Duties of heads of State agencies.

(a) The head of each State agency, including the chair of each board subject to this Chapter, shall take an active role in furthering ethics in public service and ensuring compliance with this Chapter. The head of each State agency and the chair of each board shall make a conscientious, good-faith effort to assist public servants within the agency or on the board in monitoring their personal, financial, and professional affairs to avoid taking any action that results in a conflict of interest.

(b) The head of each State agency, including the chair of each board subject to this Chapter, shall maintain familiarity with and stay knowledgeable of the reports, opinions, newsletters, and other communications from the Commission regarding ethics in general and the interpretation and enforcement of this Chapter. The head of each State agency and the chair of each board shall also maintain familiarity with and stay knowledgeable of the Commission's reports, evaluations, opinions, or findings regarding individual public servants in that individual's agency or on that individual's board, or under that individual's supervision or control, including all reports, evaluations, opinions, or findings pertaining to actual or potential conflicts of interest.

(c) When an actual or potential conflict of interest is cited by the Commission under G.S. 138A-24(e) with regard to a public servant sitting on a board, the conflict shall be recorded in the minutes of the applicable board and duly brought to the attention of the membership by the board's chair as often as necessary to remind all members of the conflict and to help ensure compliance with this Chapter.

(d) The head of each State agency, including the chair of each board subject to this Chapter, shall periodically remind public servants under that individual's authority of the public servant's duties to the public under the ethical standards and rules of conduct in this Chapter, including the duty of each public servant to continually monitor, evaluate, and manage the public servant's personal, financial, and professional affairs to ensure the absence of conflicts of interest.

(e) At the beginning of any meeting of a board, the chair shall remind all members of their duty to avoid conflicts of interest under this Chapter. The chair also shall inquire as to whether there is any known conflict of interest with respect to any matters coming before the board at that time.

(f) The head of each State agency, including the chair of each board subject to this Chapter, shall ensure that legal counsel employed by or assigned to their agency or board are familiar with the provisions of this Chapter, including the Ethical Standards for Covered Persons set forth in Article 4 of this Chapter, and are available to advise public servants on the ethical considerations

involved in carrying out their public duties in the best interest of the public. Legal counsel so engaged may consult with the Commission, seek the Commission's assistance or advice, and refer public servants and others to the Commission as appropriate.

(g) Taking into consideration the individual autonomy, needs, and circumstances of each agency and board, the head of each State agency, including the chair of each board subject to this Chapter, shall consider the need for the development and implementation of in-house educational programs, procedures, or policies tailored to meet the agency's or board's particular needs for ethics education, conflict identification, and conflict avoidance. This includes the periodic presentation to all agency heads, their chief deputies or assistants, other public servants under their supervision or control, and members of boards, of the basic ethics education and awareness presentation outlined in G.S. 138A-14 and any other workshop or seminar program the agency head or board chair deems necessary in implementing this Chapter. Agency heads and board chairs may request reasonable assistance from the Commission in complying with the requirements of this subsection.

(h) As soon as reasonably practicable after the designation, hiring, or promotion of their chief deputies, assistants, or other public servants under their supervision or control, or learning of the appointment or election of other public servants to a board covered under this Chapter, all agency heads and board chairs shall (i) notify the Commission of such designation, hiring, promotion, appointment, or election and (ii) provide these public servants with copies of this Chapter and all applicable financial disclosure forms, if these materials and forms have not been previously provided to these public servants in connection with their designation, hiring, promotion, appointment, or election. In order to avoid duplication of effort, agency heads and board chairs shall coordinate this effort with the Commission's staff. (2006-201, s. 1; 2007-347, s. 9(b); 2008-213, ss. 61, 62.)

§ 138A-16. Reserved for future codification purposes.

§ 138A-17. Reserved for future codification purposes.

§ 138A-18. Reserved for future codification purposes.

§ 138A-19. Reserved for future codification purposes.

§ 138A-20. Reserved for future codification purposes.

Article 3.

Public Disclosure of Economic Interests.

§ 138A-21. Purpose.

The purpose of disclosure of the financial and personal interests by covered persons is to assist covered persons and those who appoint, elect, hire, supervise, or advise them identify and avoid conflicts of interest and potential conflicts of interest between the covered person's private interests and the covered person's public duties. It is critical to this process that current and prospective covered persons examine, evaluate, and disclose those personal and financial interests that could be or cause a conflict of interest or potential conflict of interest between the covered person's private interests and the covered person's public duties. Covered persons must take an active, thorough, and conscientious role in the disclosure and review process, including having a complete knowledge of how the covered person's public position or duties might impact

the covered person's private interests. Covered persons have an affirmative duty to provide any and all information that a reasonable person would conclude is necessary to carry out the purposes of this Chapter and to fully disclose any conflict of interest or potential conflict of interest between the covered person's public and private interests, but the disclosure, review, and evaluation process is not intended to result in the disclosure of unnecessary or irrelevant personal information. (2006-201, s. 1; 2008-213, s. 63.)

§ 138A-22. Statement of economic interest; filing required.

(a) Every covered person subject to this Chapter who is elected, appointed, or employed, including one appointed to fill a vacancy in elective office, except for public servants (i) included under G.S. 138A-3(30)b., e., f., or g. whose annual compensation from the State is less than sixty thousand dollars (\$60,000), or (ii) who are ex officio student members under Chapters 115D and 116 of the General Statutes, shall file a statement of economic interest with the Commission prior to the covered person's initial appointment, election, or employment and no later than April 15 of every year thereafter, except as otherwise filed under subsections (c1) and (d) of this section. A prospective covered person required to file a statement under this Chapter shall not be appointed, employed, or receive a certificate of election, prior to submission by the Commission of the Commission's evaluation of the statement in accordance with this Article. The requirement for an annual filing under this subsection also shall apply to covered persons whose terms have expired but who continue to serve until the covered person's replacement is appointed. Once a statement of economic interest is properly completed and filed under this Article, the statement of economic interest does not need to be supplemented or refiled prior to the next due date set forth in this subsection.

(b) Notwithstanding subsection (a) of this section, individuals hired by, and appointees of, constitutional officers of the State may file a statement of economic interest within 30 days after their appointments or employment when the appointment or employment is made during the first 60 days of the constitutional officer's initial term in that constitutional office.

(c) Notwithstanding subsection (a) of this section, public servants, under G.S. 138A-3(30)j. and k., who have submitted a statement of economic interest under subsection (a) of this section, may be hired, appointed, or elected provisionally prior to submission by the Commission of the Commission's evaluation of the statement in accordance with this Article, subject to dismissal or removal based on the Commission's evaluation.

(c1) A public servant reappointed to a board between January 1 and April 15 shall file a current statement of economic interest prior to the reappointment.

(c2) A public servant appointed to a board determined and designated as nonadvisory under G.S. 138A-10(a)(3) shall file the initial statement of economic interest within 60 days of notification of the designation by the Commission and as provided in this section thereafter.

(d) A candidate for an office subject to this Article shall file the statement of economic interest at the same place and in the same manner as the notice of candidacy for that office is required to be filed under G.S. 163-106 or G.S. 163-323 within 10 days of the filing deadline for the office the candidate seeks. An individual who is nominated under G.S. 163-114 after the primary and before the general election, and an individual who qualifies under G.S. 163-122 as an unaffiliated candidate in a general election, shall file a statement of economic interest with the county board of elections of each county in the senatorial or representative district. An individual nominated under G.S. 163-114 shall file the statement within three days following the

individual's nomination, or not later than the day preceding the general election, whichever occurs first. An individual seeking to qualify as an unaffiliated candidate under G.S. 163-122 shall file the statement of economic interest with the petition filed under that section. An individual seeking to have write-in votes counted for that individual in a general election shall file a statement of economic interest at the same time the candidate files a declaration of intent under G.S. 163-123. A candidate of a new party chosen by convention shall file a statement of economic interest at the same time that the president of the convention certifies the names of its candidates to the State Board of Elections under G.S. 163-98.

(d1) In addition to subsections (a) and (d) of this section, a covered person holding elected office or a former covered person who held elected office subject to this Article shall file a statement of economic interest in all of the following instances, as specified:

- (1) Filed on or before April 15 of the year following the year a covered person or former covered person does not file a notice of candidacy or petition for election, or does not receive a certificate of election, to the position making that individual a covered person, with all information provided in the statement of economic interest current as of the last day of December of the preceding year.
- (2) Filed on or before April 15 of the year following the year the covered person or former covered person resigns from the position making that individual a covered person, with all information provided in the statement of economic interest current as of the last day in the position.

(e) The State Board of Elections shall provide for notification of the statement of economic interest requirements of this Article to be given to any candidate filing for nomination or election to those offices subject to this Article at the time of the filing of candidacy.

(f) Within 10 days of the filing deadline for office of a covered person, the executive director of the State Board of Elections shall send to the State Ethics Commission a list of the names and addresses of each candidate who have filed as a candidate for office as a covered person. A county board of election shall forward any statements of economic interest filed with the board under this section to the State Board of Elections. The executive director of the State Board of Elections shall forward a certified copy of the statements of economic interest to the Commission for evaluation upon its filing with the State Board of Elections under this section.

(g) The Commission shall issue forms to be used for the statement of economic interest and shall revise the forms from time to time as necessary to carry out the purposes of this Chapter. Except as otherwise set forth in this section and in G.S. 138A-15(h), upon notification by the employing entity, the Commission shall furnish to all other covered persons the appropriate forms needed to comply with this Article. (2006-201, s. 1; 2007-29, s. 2; 2007-348, ss. 32, 33; 2008-213, s. 64; 2009-549, s. 13; 2010-169, ss. 12, 22(b).)

§ 138A-23. Statements of economic interest as public records.

(a) The statements of economic interest filed by prospective public servants under this Article for appointed or employed positions and written evaluations by the Commission of these statements are not public records until the prospective public servant is appointed or employed by the State. All other statements of economic interest and all other written evaluations by the Commission of those statements are public records.

(b) The statements of economic interest filed by prospective public servants, and the written evaluations by the Commission of those statements, for individuals elected by the General Assembly shall be provided to the chair of the standing committee handling the legislation regarding the election and made available to all members of the General Assembly. The statements of economic interest filed by public servants elected to positions by the General Assembly, and written evaluations by the Commission of those statements, are not public records until the prospective public servant is sworn into office.

(c) The statements of economic interest filed by prospective public servants, and the written evaluations by the Commission of those statements, for individuals confirmed for appointment as a public servant by the General Assembly shall be provided to the chair of the standing committee handling the legislation regarding the appointment. The statements of economic interest filed by prospective public servants for confirmation for appointment by the General Assembly, and written evaluations by the Commission of those statements, are public records at the time of the announcement of the appointment. (2006-201, s. 1; 2007-347, s. 10; 2008-213, ss. 65, 66.)

§ 138A-24. Contents of statement.

(a) Any statement of economic interest filed under this Article shall be on a form prescribed by the Commission. Answers must be provided to all questions. The form shall include the following information about the filing person and the filing person's immediate family:

- (1) Except as otherwise provided in this subdivision, the name, current mailing address, occupation, employer, and business of the filing person. Any individual holding or seeking elected office for which residence is a qualification for office shall include a home address. A judicial officer may use a current mailing address instead of the home address on the form required in this subsection. The filing person may also use the initials instead of the name of any unemancipated child of the filing person who also resides in the household of the filing person. If the filing person provides the initials of an unemancipated child, the filing person shall concurrently provide the name of the unemancipated child to the Commission. The name of an unemancipated child provided by the filing person to the Commission shall not be a public record under Chapter 132 of the General Statutes and is privileged and confidential.
- (2) A list of each asset and liability included in this subdivision of whatever nature (including legal, equitable, or beneficial interest) with a value of at least ten thousand dollars (\$10,000) owned by the filing person and the filing person's immediate family, except assets or liabilities held in a blind trust. This list shall include the following:
 - a. All real estate located in the State owned wholly or in part by the filing person or the filing person's immediate family, including descriptions adequate to determine the location by city and county of each parcel.
 - b. Real estate that is currently leased or rented to or from the State.
 - c. Personal property sold to or bought from the State within the preceding two years.
 - d. Personal property currently leased or rented to or from the State.

- e. The name of each publicly owned company. For purposes of this sub-subdivision, the term "publicly owned company" shall not include a widely held investment fund, including a mutual fund, regulated investment company, or pension or deferred compensation plan, if all of the following apply:
 - 1. The filing person or a member of the filing person's immediate family neither exercises nor has the ability to exercise control over the financial interests held by the fund.
 - 2. The fund is publicly traded, or the fund's assets are widely diversified.
 - f. The name of each nonpublicly owned company or business entity, including interests in sole proprietorships, partnerships, limited partnerships, joint ventures, limited liability companies, limited liability partnerships, and closely held corporations.
 - g. For each company or business entity listed under sub-subdivision f. of this subdivision, if known, a list of any other companies or business entities in which the company or business entity owns securities or equity interests exceeding a value of ten thousand dollars (\$10,000).
 - h. Repealed by Session Laws 2010-169, s. 13(a), effective January 1, 2011, and applicable to statements of economic interest filed on or after that date.
 - i. Recodified as subdivision (a)(16) by Session Laws 2010-169, s. 13(c), effective January 1, 2011, and applicable to statements of economic interest filed on or after that date.
 - j. For a vested trust created, established, or controlled by the filing person of which the filing person or the members of the filing person's immediate family are the beneficiaries, excluding a blind trust, the name and address of the trustee, a description of the trust, and the filing person's relationship to the trust.
 - k. A list of all liabilities, excluding indebtedness on the filing person's primary personal residence, by type of creditor and debtor.
 - l. Repealed by Session Laws 2007-348, s. 34. See Editor's note for effective date.
 - m. A list of all stock options in a company or business not otherwise disclosed on this statement.
- (3) The name of each source (not specific amounts) of income of more than five thousand dollars (\$5,000) received during the previous year by business or industry type, if that source is not listed under subdivision (2) of this subsection. Income shall include salary, wages, professional fees, honoraria, interest, dividends, rental income, and business income from any source other than capital gains, federal government retirement, military retirement, or social security income.
- (4) If the filing person is a practicing attorney, an indication of whether the filing person, or the law firm with which the filing person is affiliated, earned legal

fees during the past year in excess of ten thousand dollars (\$10,000) from any of the following categories of legal representation:

- a. Administrative law.
- b. Admiralty law.
- c. Corporate law.
- d. Criminal law.
- e. Decedents' estates law.
- f. Environmental law.
- g. Insurance law.
- h. Labor law.
- i. Local government law.
- j. Negligence or other tort litigation law.
- k. Real property law.
- l. Securities law.
- m. Taxation law.
- n. Utilities regulation law.

- (5) Except for a filing person in compliance under subdivision (4) of this subsection, if the filing person is a licensed professional or provides consulting services, either individually or as a member of a professional association, a list of categories of business and the nature of services rendered, for which payment for services were charged or paid during the past year in excess of ten thousand dollars (\$10,000).
- (6) An indication of whether the filing person, the filing person's employer, a member of the filing person's immediate family, or the immediate family member's employer is licensed or regulated by, or has a business relationship with, the board or employing entity with which the filing person is or will be associated. This subdivision does not apply to a legislator, a judicial officer, or that legislator's or judicial officer's immediate family.
- (7) A list of societies, organizations, or advocacy groups, pertaining to subject matter areas over which the public servant's agency or board may have jurisdiction, in which the public servant or a member of the public servant's immediate family is a director, officer, or governing board member. This subdivision does not apply to a legislator, a judicial officer, or that legislator's or judicial officer's immediate family.
- (8) A list of all things with a total value of over two hundred dollars (\$200.00) per calendar quarter given and received without valuable consideration and under circumstances that a reasonable person would conclude that the thing was given for lobbying, if such things were given by a person not required to report under Chapter 120C of the General Statutes, excluding things given by a member of the filing person's extended family. The list shall include only those things received during the 12 months preceding the reporting period under subsection (d) of this section, and shall include the source of those things. The list required by this subdivision shall not apply to things of monetary value received by the filing person prior to the time the filing person

- filed or was nominated as a candidate for office, as described in G.S. 138A-22, or was appointed or employed as a covered person.
- (9) A list of any felony convictions of the filing person, excluding any felony convictions for which a pardon of innocence or order of expungement has been granted.
 - (10) Any other information that the filing person believes may assist the Commission in advising the filing person with regards to compliance with this Chapter.
 - (11) A list of any nonprofit corporation or organization with which associated during the preceding calendar year, including a list of which of those nonprofit corporations or organizations with which associated do business with the State or receive State funds and a brief description of the nature of the business, if known or with which due diligence could reasonably be known.
 - (12) A statement of whether the filing person or the filing person's immediate family is or has been a lobbyist or lobbyist principal registered under Chapter 120C of the General Statutes within the preceding 12 months.
 - (13) A list of all contributions as defined in G.S. 163-278.6(6) with a cumulative total of more than one thousand dollars (\$1,000) made by the filing person only, during the preceding calendar year, to the candidate or candidate campaign committee of the covered person as defined in G.S. 138A-3(30)a. appointing the filing person to the covered board.
 - (14) A statement indicating "Yes" or "No" as to whether the filing person engaged in each of the following activities during the preceding calendar year, with respect to or on the behalf of the candidate or candidate campaign committee of the covered person as defined in G.S. 138A-3(30)a. appointing the filing person:
 - (i) collected contributions from multiple contributors, took possession of such multiple contributions, and transferred or delivered those collected multiple contributions,
 - (ii) hosted a fund-raiser in the filing person's residence or place of business, or
 - (iii) volunteered for campaign-related activity. This subdivision only applies to filing persons in the following categories:
 - a. A public servant, or a prospective appointee to, as defined in G.S. 138A-3(30)c.
 - b. A judicial officer that serves on, or a prospective appointee to, the Supreme Court, the Court of Appeals, the superior court, or the district court.
 - c. A covered person serving on, or a prospective appointee to, one of the following panels or boards:
 1. Alcoholic Beverage Control Commission.
 2. Coastal Resources Commission.
 3. State Board of Education.
 4. State Board of Elections.
 5. Division of Employment Security.
 6. Environmental Management Commission.
 7. Industrial Commission.
 8. State Personnel Commission.
 9. Rules Review Commission.
 10. Board of Transportation.

11. Board of Governors of the University of North Carolina.

12. Utilities Commission.

13. Wildlife Resources Commission.

(15) The name of each business with which associated that the filing person or a member of the filing person's immediate family is an employee, director, officer, partner, proprietor, or member or manager.

(16) For any company or business entity listed under subdivision (15) of this subsection and sub-subdivisions f. and g. of subdivision (2) of this subsection, if known, a statement whether that company or business entity has any material business dealings or business contracts with the State, or is regulated by the State, including a brief description of the business activity.

(b) The Supreme Court, the Committee, constitutional officers of the State, heads of principal departments, the Board of Governors of The University of North Carolina, the State Board of Community Colleges, other boards, and the appointing authority or employing entity may require a filing person to file supplemental information in conjunction with the filing of that filing person's statement of economic interest. These supplemental filings requirements shall be filed with the Commission and included on the forms to be filed with the Commission. The Commission shall evaluate the supplemental forms as part of the statement of economic interest. The failure to file supplemental forms shall be subject to the provisions of G.S. 138A-25.

(c) Each statement of economic interest shall contain a certification by the filing person that the filing person has read the statement and that, to the best of the filing person's knowledge and belief, the statement is true, correct, and complete. The filing person's certification also shall provide that the filing person has not transferred, and will not transfer, any asset, interest, or other property with the intent to conceal it from disclosure while retaining an equitable interest therein.

(c1) Reserved for future codification purposes.

(c2) Recodified as G.S. 138A-22(c2) by Session Laws 2010-169, s. 22(b), effective August 2, 2010.

(d) All information provided in the statement of economic interest shall be current as of the last day of December of the year preceding the date the statement of economic interest was due.

(e) The Commission shall prepare a written evaluation of each statement of economic interest relative to conflicts of interest and potential conflicts of interest. This subsection does not apply to statements of economic interest of legislators and judicial officers. The Commission shall submit the evaluation to all of the following:

(1) The filing person who submitted the statement.

(2) The head of the agency in which the filing person serves.

(3) The Governor for gubernatorial appointees and employees in agencies under the Governor's authority.

(4) Repealed by Session Laws 2008-213, s. 74, effective August 15, 2008.

(5) The appointing or hiring authority for those public servants not under the Governor's authority.

(6) The State Board of Elections for those filing persons who are elected.

(7) Repealed by Session Laws 2008-213, s. 74, effective August 15, 2008.

(f) The Commission shall prepare a written evaluation of each statement of economic interest for nominees of the Board of Governors of The University of North Carolina elected pursuant to

G.S. 116-6, and nominees of the State Board of Community Colleges elected pursuant to G.S. 115D-2.1 within seven days of the submission of the completed statement of economic interest to the Commission. (2006-201, s. 1; 2007-29, s. 1; 2007-348, s. 34; 2008-187, s. 32; 2008-213, ss. 67-72(a), 73, 74, 74.5, 91; 2009-549, s. 14; 2009-570, s. 45; 2010-169, ss. 13(a)-(d), 17(q), 22(b); 2011-401, s. 3.18.)

§ 138A-25. Failure to file.

(a) Within 30 days after the date due under G.S. 138A-22, the Commission shall notify filing persons who have failed to file or filing persons whose statement has been deemed incomplete. For a filing person currently serving as a covered person, the Commission shall notify the filing person and the ethics liaison that if the statement of economic interest is not filed or completed within 30 days of receipt of the notice of failure to file or complete, the filing person shall be subject to a fine as provided for in this section.

(b) Any filing person who fails to file or complete a statement of economic interest within 30 days of the receipt of the notice, required under subsection (a) of this section, shall be subject to a fine of two hundred fifty dollars (\$250.00), to be imposed by the Commission.

(c) Failure by any filing person to file or complete a statement of economic interest within 60 days of the receipt of the notice, required under subsection (a) of this section, shall be deemed to be a violation of this Chapter and shall be grounds for disciplinary action under G.S. 138A-45. (2006-201, s. 1; 2008-213, s. 75; 2009-549, s. 15.)

§ 138A-26. Concealing or failing to disclose material information.

A filing person who knowingly conceals or knowingly fails to disclose information that is required to be disclosed on a statement of economic interest under this Article shall be guilty of a Class 1 misdemeanor and shall be subject to disciplinary action under G.S. 138A-45. (2006-201, s. 1.)

§ 138A-27. Penalty for false information.

A filing person who provides false information on a statement of economic interest as required under this Article knowing that the information is false is guilty of a Class H felony and shall be subject to disciplinary action under G.S. 138A-45. (2006-201, s. 1.)

§ 138A-28: Reserved for future codification purposes.

§ 138A-29: Reserved for future codification purposes.

§ 138A-30: Reserved for future codification purposes.

Article 4.

Ethical Standards for Covered Persons.

§ 138A-31. Use of public position for private gain.

(a) Except as permitted under G.S. 138A-38, a covered person or legislative employee shall not knowingly use the covered person's or legislative employee's public position in an official action or legislative action that will result in financial benefit to the covered person or legislative employee, a member of the covered person's or legislative employee's extended family, or business with which the covered person or legislative employee is associated. This subsection shall not apply to financial or other benefits derived by a covered person or legislative employee

that the covered person or legislative employee would enjoy to an extent no greater than that which other citizens of the State would or could enjoy, or that are so remote, tenuous, insignificant, or speculative that a reasonable person would conclude under the circumstances that the covered person's or legislative employee's ability to protect the public interest and perform the covered person's or legislative employee's official duties would not be compromised.

(b) A covered person shall not mention or authorize another person to mention the covered person's public position in nongovernmental advertising that advances the private interest of the covered person or others. The prohibition in this subsection shall not apply to any of the following:

- (1) Political advertising.
- (2) News stories and articles.
- (3) The inclusion of a covered person's public position in a directory or a biographical listing.
- (4) The inclusion of a covered person's public position in an agenda or other document related to a meeting, conference, or similar event when the disclosure could reasonably be considered material by an individual attending the meeting, conference, or similar event.
- (5) The inclusion of a covered person's public position in a charitable solicitation for a nonprofit business entity qualifying under 26 U.S.C. § 501(c)(3).
- (6) The disclosure of a covered person's position to an existing or prospective customer, supplier, or client when the disclosure could reasonably be considered material by the customer, supplier, or client.

(c) Notwithstanding G.S. 163-278.16A, no covered person shall use or permit the use of State funds for any advertisement or public service announcement in a newspaper, on radio, television, magazines, or billboards, that contains that covered person's name, picture, or voice, except in case of State or national emergency and only if the announcement is reasonably necessary to the covered person's official function. This subsection shall not apply to fund-raising on behalf of and aired on public radio or public television. (2006-201, s. 1; 2009-549, s. 16; 2011-393, s. 1.)

§ 138A-32. Gifts.

(a) A covered person or a legislative employee shall not knowingly, directly or indirectly, ask, accept, demand, exact, solicit, seek, assign, receive, or agree to receive anything of value for the covered person or legislative employee, or for another person, in return for being influenced in the discharge of the covered person's or legislative employee's official responsibilities, other than that which is received by the covered person or the legislative employee from the State for acting in the covered person's or legislative employee's official capacity.

(b) A covered person may not solicit for a charitable purpose any thing of monetary value from any subordinate State employee. This subsection shall not apply to generic written solicitations to all members of a class of subordinates. Nothing in this subsection shall prohibit a covered person from serving as the honorary head of the State Employees Combined Campaign.

(c) No public servant, legislator, or legislative employee shall knowingly accept a gift from a lobbyist or lobbyist principal registered under Chapter 120C of the General Statutes. No legislator or legislative employee shall knowingly accept a gift from liaison personnel designated under Chapter 120C of the General Statutes. No public servant, legislator, or legislative employee shall accept a gift knowing all of the following:

- (1) The gift was obtained indirectly from a lobbyist, lobbyist principal, or liaison personnel registered under Chapter 120C of the General Statutes.
 - (2) The lobbyist, lobbyist principal, or liaison personnel registered under Chapter 120C of the General Statutes intended for an ultimate recipient of the gift to be a public servant, legislator, or legislative employee as provided in G.S. 120C-303.
- (d) No public servant shall knowingly accept a gift from a person whom the public servant knows or has reason to know any of the following:
- (1) Is doing or is seeking to do business of any kind with the public servant's employing entity.
 - (2) Is engaged in activities that are regulated or controlled by the public servant's employing entity.
 - (3) Has financial interests that may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the public servant's official duties.
- (d1) No public servant shall accept a gift knowing all of the following:
- (1) The gift was obtained indirectly from a person described under subdivision (d)(1), (2), or (3) of this section.
 - (2) The person described under subdivision (d)(1), (2), or (3) of this section intended for an ultimate recipient of the gift to be a public servant.
- (e) Subsections (c), (d), and (d1) of this section shall not apply to any of the following:
- (1) Food and beverages for immediate consumption in connection with any of the following:
 - a. An open meeting of a public body, provided that the open meeting is properly noticed under Article 33C of Chapter 143 of the General Statutes.
 - b. A gathering of a person or governmental unit with at least 10 or more individuals in attendance open to the general public, provided that a sign or other communication containing a message that is reasonably designed to convey to the general public that the gathering is open to the general public is displayed at the gathering.
 - c. A gathering of a person or governmental unit to which the entire board of which a public servant is a member, at least 10 public servants, all the members of the House of Representatives, all the members of the Senate, all the members of a county or municipal legislative delegation, all the members of a recognized legislative caucus with regular meetings other than meetings with one or more lobbyists, all the members of a committee, a standing subcommittee, a joint committee or joint commission of the House of Representatives, the Senate, or the General Assembly, or all legislative employees are invited, and one of the following applies:
 1. At least 10 individuals associated with the person or governmental unit actually attend, other than the covered person or legislative employee, or the immediate family of the covered person or legislative employee.

2. All shareholders, employees, board members, officers, members, or subscribers of the person or governmental unit located in North Carolina are notified and invited to attend.

For purposes of this sub-subdivision only, the term "invited" shall mean written notice from at least one host or sponsor of the gathering containing the date, time, and location of the gathering given at least 24 hours in advance of the gathering to the specific qualifying group listed in this sub-subdivision. If it is known at the time of the written notice that at least one sponsor is a lobbyist or lobbyist principal, the written notice shall also state whether or not the gathering is permitted under this section.

- (2) Informational materials relevant to the duties of the covered person or legislative employee.
- (3) Reasonable actual expenditures of the legislator, public servant, or legislative employee for food, beverages, registration, travel, lodging, other incidental items of nominal value, and entertainment, in connection with (i) a legislator's, public servant's, or legislative employee's attendance at an educational meeting for purposes primarily related to the public duties and responsibilities of the legislator, public servant, or legislative employee; (ii) a legislator's, public servant's, or legislative employee's participation as a speaker or member of a panel at a meeting; (iii) a legislator's or legislative employee's attendance and participation in meetings of a nonpartisan state, regional, national, or international legislative organization of which the General Assembly is a member or that the legislator or legislative employee is a member or participant of by virtue of that legislator's or legislative employee's public position, or as a member of a board, agency, or committee of such organization; or (iv) a public servant's attendance and participation in meetings as a member of a board, agency, or committee of a nonpartisan state, regional, national, or international organization of which the public servant's agency is a member or the public servant is a member by virtue of that public servant's public position, provided the following conditions are met:
 - a. The reasonable actual expenditures shall be made by a lobbyist principal, and not a lobbyist.
 - b. Any meeting must be attended by at least 10 or more participants, have a formal agenda, and notice of the meeting has been given at least 10 days in advance.
 - c. Any food, beverages, transportation, or entertainment must be provided to all attendees or defined groups of 10 or more attendees as part of the meeting or in conjunction with the meeting.
 - d. Any entertainment must be incidental to the principal agenda of the meeting.
 - e. If the legislator, public servant, or legislative employee is participating as a speaker or member of a panel, then that legislator, public servant, or legislative employee must be a bona fide speaker or participant.

- (4) A plaque or similar nonmonetary memento recognizing individual services in a field or specialty or to a charitable cause.
- (5) Gifts accepted on behalf of the State for use by the State or for the benefit of the State.
- (6) Anything generally made available or distributed to the general public or all other State employees by lobbyists or lobbyist principals, or persons described in subdivisions (d)(1), (2), or (3) of this section.
- (7) Gifts from the covered person's or legislative employee's extended family, or a member of the same household of the covered person or legislative employee.
- (8) Gifts given to a public servant not otherwise subject to an exception under this subsection, where the gift is food and beverages, transportation, lodging, entertainment or related expenses associated with the public business of industry recruitment, promotion of international trade, or the promotion of travel and tourism, and the public servant is responsible for conducting the business on behalf of the State, provided all the following conditions apply:
 - a. The public servant did not solicit the gift, and the public servant did not accept the gift in exchange for the performance of the public servant's official duties.
 - b. The public servant reports electronically to the Commission within 30 days of receipt of the gift or of the date set for disclosure of public records under G.S. 132-6(d), if applicable. The report shall include a description and value of the gift and a description how the gift contributed to the public business of industry recruitment, promotion of international trade, or the promotion of travel and tourism. This report shall be posted to the Commission's public Web site.
 - c. A tangible gift, other than food or beverages, not otherwise subject to an exception under this subsection shall be turned over as State property to the Department of Commerce within 30 days of receipt, except as permitted under subsection (f) of this section.
- (9) Gifts of personal property valued at less than one hundred dollars (\$100.00) given to a public servant in the commission of the public servant's official duties if the gift is given to the public servant as a personal gift in another country as part of an overseas trade mission, and the giving and receiving of such personal gifts is considered a customary protocol in the other country.
- (10) Gifts given or received as part of a business, civic, religious, fraternal, personal, or commercial relationship provided all of the following conditions are met:
 - a. The relationship is not related to the public servant's, legislator's, or legislative employee's public service or position.
 - b. The gift is made under circumstances that a reasonable person would conclude that the gift was not given to lobby.
- (11) Food and beverages for immediate consumption and related transportation provided all of the following conditions are met:
 - a. The food, beverage, or transportation is given by a lobbyist principal and not a lobbyist.

- b. The food, beverage, or transportation is provided during a conference, meeting, or similar event and is available to all attendees of the same class as the recipient.
 - c. The recipient of the food, beverage, or transportation is a director, officer, governing board member, employee, or independent contractor of one of the following:
 - 1. The lobbyist principal giving the food, beverage, or transportation.
 - 2. A third party that received the funds to purchase the food, beverages, or transportation.
- (12) Food and beverages for immediate consumption at an organized gathering of a person, the State, or a governmental unit to which a public servant is invited to attend for purposes primarily related to the public servant's public service or position, and to which at least 10 individuals, other than the public servant, or the public servant's immediate family, actually attend, or to which all shareholders, employees, board members, officers, members, or subscribers of the person or governmental unit who are located in a specific North Carolina office or county are notified and invited to attend.

(f) A prohibited gift that would constitute an expense appropriate for reimbursement by the public servant's employing entity if it had been incurred by the public servant personally shall be considered a gift accepted by or donated to the State, provided the public servant has been approved by the public servant's employing entity to accept or receive such things of value on behalf of the State. The fact that the employing entity's reimbursement rate for the type of expense is less than the value of a particular gift shall not render the gift prohibited.

(g) A prohibited gift shall be, and a permissible gift may be, promptly declined, returned, paid for at fair market value, or donated to charity or the State.

(h) A covered person or legislative employee shall not accept an honorarium from a source other than the employing entity for conducting any activity where any of the following apply:

- (1) The employing entity reimburses the covered person or legislative employee for travel, subsistence, and registration expenses.
- (2) The employing entity's work time or resources are used.
- (3) The activity would be considered official duty or would bear a reasonably close relationship to the covered person's or legislative employee's official duties.

An outside source may reimburse the employing entity for actual expenses incurred by a covered person or legislative employee in conducting an activity within the duties of the covered person or legislative employee, or may pay a fee to the employing entity, in lieu of an honorarium, for the services of the covered person or legislative employee. An honorarium permissible under this subsection shall not be considered a gift for purposes of subsection (c) of this section.

(i) Acceptance or solicitation of a gift in compliance with this section without corrupt intent shall not constitute a violation of the statutes related to bribery under G.S. 14-217, 14-218, or 120-86. (2006-201, s. 1; 2007-347, s. 11; 2007-348, ss. 15(b), 35-41(a); 2008-213, ss. 77(a), 78(a), 79-82, 90; 2009-549, s. 17; 2010-169, ss. 15(b), (c), 17(r).)

§ 138A-33. Other compensation.

A public servant or legislative employee shall not solicit or receive personal financial gain, other than that received by the public servant or legislative employee from the State, or with the

approval of the employing entity, for acting in the public servant's or legislative employee's official capacity, or for advice or assistance given in the course of carrying out the public servant's or legislative employee's duties. (2006-201, s. 1.)

§ 138A-34. Use of information for private gain.

A public servant or legislative employee shall not use or disclose nonpublic information gained in the course of, or by reason of, the public servant's or legislative employee's official responsibilities in a way that would affect a personal financial interest of the public servant or legislative employee, a member of the public servant's or legislative employee's extended family, or a person or governmental unit with whom or business with which the public servant or legislative employee is associated. A public servant or legislative employee shall not improperly use or improperly disclose any confidential information. (2006-201, s. 1; 2008-213, s. 83.)

§ 138A-35. Other rules of conduct.

(a) A public servant shall make a due and diligent effort before taking any action, including voting or participating in discussions with other public servants on a board on which the public servant also serves, to determine whether the public servant has a conflict of interest. If the public servant is unable to determine whether or not a conflict of interest may exist, the public servant has a duty to inquire of the Commission as to that conflict.

(b) A public servant shall continually monitor, evaluate, and manage the public servant's personal, financial, and professional affairs to ensure the absence of conflicts of interest.

(c) A public servant shall obey all other civil laws, administrative requirements, and criminal statutes governing conduct of State government applicable to appointees and employees. (2006-201, s. 1.)

§ 138A-36. Public servant participation in official actions.

(a) Except as permitted by subsection (d) of this section and under G.S. 138A-38, no public servant acting in that capacity, authorized to perform an official action requiring the exercise of discretion, shall participate in an official action by the employing entity if the public servant knows the public servant or a person with which the public servant is associated may incur a reasonably foreseeable financial benefit from the matter under consideration, which financial benefit would impair the public servant's independence of judgment or from which it could reasonably be inferred that the financial benefit would influence the public servant's participation in the official action.

(b) A public servant described in subsection (a) of this section shall abstain from taking any verbal or written action in furtherance of the official action. The public servant shall submit in writing to the employing entity the reasons for the abstention. When the employing entity is a board, the abstention shall be recorded in the employing entity's minutes.

(c) A public servant shall take appropriate steps, under the particular circumstances and considering the type of proceeding involved, to remove himself or herself to the extent necessary, to protect the public interest and comply with this Chapter, from any proceeding in which the public servant's impartiality might reasonably be questioned due to the public servant's familial, personal, or financial relationship with a participant in the proceeding. A participant includes (i) an owner, shareholder, partner, member or manager of a limited liability company, employee, agent, officer, or director of a business, organization, or group involved in the

proceeding, or (ii) an organization or group that has petitioned for rule making or has some specific, unique, and substantial interest in the proceeding. Proceedings include quasi-judicial proceedings and quasi-legislative proceedings. A personal relationship includes one in a leadership or policy-making position in a business, organization, or group.

(d) If a public servant is uncertain about whether the relationship described in subsection (c) of this section justifies removing the public servant from the proceeding under subsection (c) of this section, the public servant shall disclose the relationship to the individual presiding over the proceeding and seek appropriate guidance. The presiding officer, in consultation with legal counsel if necessary, shall then determine the extent to which the public servant will be permitted to participate. If the affected public servant is the individual presiding, then the vice-chair or any other substitute presiding officer shall make the determination. A good-faith determination under this subsection of the allowable degree of participation by a public servant is presumptively valid and only subject to review under G.S. 138A-12 upon a clear and convincing showing of mistake, fraud, abuse of discretion, or willful disregard of this Chapter.

(e) This section shall not allow participation in an official action prohibited by G.S. 14-234. (2006-201, s. 1; 2007-347, s. 12; 2007-348, s. 42; 2008-213, s. 84(a).)

§ 138A-37. Legislator participation in legislative actions.

(a) Except as permitted under G.S. 138A-38, no legislator shall participate in a legislative action if the legislator knows the legislator or a person with which the legislator is associated may incur a reasonably foreseeable financial benefit from the action, and if after considering whether the legislator's judgment would be substantially influenced by the financial benefit and considering the need for the legislator's particular contribution, including special knowledge of the subject matter to the effective functioning of the legislature, the legislator concludes that an actual financial benefit does exist which would impair the legislator's independence of judgment.

(a1) The legislator shall submit in writing to the principal clerk of the house of which the legislator is a member the reasons for the abstention from participation in the legislative matter.

(b) If the legislator has a material doubt as to whether the legislator should act, the legislator may submit the question for an advisory opinion to the State Ethics Commission in accordance with G.S. 138A-13 or the Legislative Ethics Committee in accordance with G.S. 120-104. (2006-201, s. 1; 2007-347, s. 13; 2008-213, s. 84(b); 2010-169, s. 22(c).)

§ 138A-38. Permitted participation exception.

(a) Notwithstanding G.S. 138A-36 and G.S. 138A-37, a covered person may participate in an official action or legislative action under any of the following circumstances except as specifically limited:

- (1) The only interest or reasonably foreseeable benefit or detriment that accrues to the covered person, the covered person's extended family, business with which the covered person is associated, or nonprofit corporation or organization with which the covered person is associated as a member of a profession, occupation, or general class is no greater than that which could reasonably be foreseen to accrue to all members of that profession, occupation, or general class.
- (2) When an official or legislative action affects or would affect the covered person's compensation and allowances as a covered person.

- (3) Before the covered person participated in the official or legislative action, the covered person requested and received from the Commission or Committee a written advisory opinion that authorized the participation. In authorizing the participation under this subdivision, the Commission or Committee shall consider the need for the legislator's particular contribution, such as special knowledge of the subject matter, to the effective functioning of the General Assembly.
- (4) Before participating in an official action, a public servant made full written disclosure to the public servant's employing entity which then made a written determination that the interest or benefit would neither impair the public servant's independence of judgment nor influence the public servant's participation in the official action. The employing entity shall file a copy of that written determination with the Commission.
- (5) When action is ministerial only and does not require the exercise of discretion.
- (6) When a public or legislative body records in its minutes that it cannot obtain a quorum in order to take the official or legislative action because the covered person is disqualified from acting under G.S. 138A-36, G.S. 138A-37, or this section, the covered person may be counted for purposes of a quorum, but shall otherwise abstain from taking any further action.
- (7) When a public servant notifies the Commission in writing that the public servant, or someone whom the public servant appoints to act in the public servant's stead, or both, are the only individuals having legal authority to take an official action, and the public servant discloses in writing the circumstances and nature of the conflict of interest.

(b) This section shall not allow participation in an official action prohibited by G.S. 14-234.

(c) Notwithstanding G.S. 138A-37, if a legislator is employed or retained by, or is an independent contractor of, a governmental unit, and the legislator is the only member of the house elected from the district where that governmental unit is located, then the legislator may take legislative action on behalf of that governmental unit provided the legislator discloses in writing to the principal clerk the nature of the relationship with the governmental unit prior to, or at the time of, taking the legislative action.

(d) Notwithstanding G.S. 138A-36, service by the president, chief financial officer, chief administrative officer, or voting member of the board of trustees of a community college as an officer, employee, or member of the board of directors of a nonprofit corporation established under G.S. 115D-20(9) to support the community college shall not constitute a conflict of interest under G.S. 138A-36, provided that the majority of the nonprofit corporation's board of directors is not comprised of the president, chief financial officer, and chief administrative officer, or voting members of the board of trustees of the community college which the nonprofit corporation was created to support. (2006-201, s. 1; 2007-347, s. 14; 2008-213, s. 85; 2010-169, s. 22(d).)

§ 138A-39. Disqualification to serve.

(a) Within 30 days of notice of the Commission's determination that a public servant has a disqualifying conflict of interest, the public servant shall eliminate the interest that constitutes the disqualifying conflict of interest or resign from the public position.

(b) Failure by a public servant to comply with subsection (a) of this section is a violation of this Chapter for purposes of G.S. 138A-45.

(c) A decision under this section shall be considered a final decision for contested case purposes under Article 3 of Chapter 150B of the General Statutes.

(d) As used in this section, a disqualifying conflict of interest is a conflict of interest of such significance that the conflict of interest would prevent a public servant from fulfilling a substantial function or portion of the public servant's public duties. (2006-201, s. 1.)

§ 138A-40. Employment and supervision of members of covered person's or legislative employee's extended family.

A covered person or legislative employee shall not cause the employment, appointment, promotion, transfer, or advancement of an extended family member of the covered person or legislative employee to a State office, or a position to which the covered person or legislative employee supervises or manages, except for positions at the General Assembly as permitted under G.S. 120-32(2). A public servant or legislative employee shall not supervise, manage, or participate in an action relating to the discipline of a member of the public servant's or legislative employee's extended family, except as specifically authorized by the public servant's or legislative employee's employing entity. (2006-201, s. 1; 2007-347, s. 15.)

§ 138A-41. Other ethics standards.

(a) Nothing in this Chapter shall prevent the Supreme Court, the Committee, the Legislative Services Commission, constitutional officers of the State, heads of principal departments, the Board of Governors of The University of North Carolina, the State Board of Community Colleges, or other boards from adopting additional or supplemental ethics standards applicable to that public agency's operations.

(b) The Governor, as a constitutional officer of the State, shall have the authority to adopt additional and supplemental ethics standards applicable to any appointee of the Governor to any State board, commission, council, committee, task force, authority, or similar public body, however denominated, created by statute or executive order, whether advisory or nonadvisory in authority. If the Governor adopts such ethics standards, the standards shall be published in the North Carolina Register and made available to each appointee subject to the ethics standards.

(c) The Governor, as a constitutional officer of the State, shall have the authority to adopt minimum ethics standards applicable to any employee of a State agency. If the Governor adopts such standards, the ethics standards shall be published in the North Carolina Register and made available to each employee subject to the ethics standards. (2006-201, s. 1; 2010-169, s. 14.)

§ 138A-42. Reserved for future codification purposes.

§ 138A-43. Reserved for future codification purposes.

§ 138A-44. Reserved for future codification purposes.

Article 5.
Violation Consequences.

§ 138A-45. Violation consequences.

(a) Violation of this Chapter by any covered person or legislative employee is grounds for disciplinary action. Except as specifically provided in this Chapter and for perjury under G.S. 138A-12 and G.S. 138A-24, no criminal penalty shall attach for any violation of this Chapter.

(b) The willful failure of any public servant serving on a board to comply with this Chapter is misfeasance, malfeasance, or nonfeasance. In the event of misfeasance, malfeasance, or nonfeasance, the offending public servant serving on a board is subject to removal from the board of which the public servant is a member. For appointees of the Governor and members of the Council of State, the appointing authority may remove the offending public servant. For appointees of the Speaker of the House of Representatives, the Speaker of the House of Representatives may remove the offending public servant. For appointees of the General Assembly made upon the recommendation of the Speaker of the House of Representatives, the Governor at the recommendation of the Speaker of the House of Representatives may remove the offending public servant. For appointees of the President Pro Tempore of the Senate, the President Pro Tempore of the Senate may remove the offending public servant. For appointees of the General Assembly made upon the recommendation of the President Pro Tempore of the Senate, the Governor at the recommendation of the President Pro Tempore of the Senate may remove the offending public servant. For public servants elected to a board by either the Senate or House of Representatives, the electing house of the General Assembly shall exercise the discretion of whether to remove the offending public servant. For all other appointees, the Commission shall exercise the discretion of whether to remove the offending public servant.

(c) The willful failure of any public servant serving as a State employee to comply with this Chapter is a violation of a written work order, thereby permitting disciplinary action as allowed by the law, including termination from employment. For employees of State departments headed by a member of the Council of State, the appropriate member of the Council of State shall make all final decisions on the manner in which the offending public servant shall be disciplined. For public servants who are judicial employees, the Chief Justice shall make all final decisions on the matter in which the offending judicial employee shall be disciplined. For legislative employees, the Legislative Services Commission shall make or refer to the hiring authority all final decisions on the matter in which the offending legislative employee shall be disciplined. For public servants appointed or elected for The University of North Carolina or the Community Colleges System, the appointing or electing authority shall make all final decisions on the matter in which the offending public servant shall be disciplined. For any other public servant serving as a State employee, the Governor shall make all final decisions on the manner in which the offending public servant shall be disciplined.

(d) The willful failure of any constitutional officer of the State to comply with this Chapter is malfeasance in office for purposes of G.S. 123-5.

(e) The willful failure of a legislator, other than the Lieutenant Governor, to comply with this Chapter is grounds for sanctions under G.S. 120-103.1.

(f) Nothing in this Chapter affects the power of the State to prosecute any person for any violation of the criminal law.

(g) The Commission may seek to enjoin violations of G.S. 138A-34. (2006-201, s. 1.)

§ 143-215.107. Air quality standards and classifications.

(a) Duty to Adopt Plans, Standards, etc. – The Commission is hereby directed and empowered, as rapidly as possible within the limits of funds and facilities available to it, and subject to the procedural requirements of this Article and Article 21:

- (1) To prepare and develop, after proper study, a comprehensive plan or plans for the prevention, abatement and control of air pollution in the State or in any designated area of the State.
- (2) To determine by means of field sampling and other studies, including the examination of available data collected by any local, State or federal agency or any person, the degree of air contamination and air pollution in the State and the several areas of the State.

* * * * *

- (4) To collect information or to require reporting from classes of sources which, in the judgment of the Environmental Management Commission, may cause or contribute to air pollution. Any person operating or responsible for the operation of air contaminant sources of any class for which the Commission requires reporting shall make reports containing such information as may be required by the Commission concerning location, size, and height of contaminant outlets, processes employed, fuels used, and the nature and time periods or duration of emissions, and such other information as is relevant to air pollution and available or reasonably capable of being assembled.
- (5) To develop and adopt emission control standards as in the judgment of the Commission may be necessary to prohibit, abate, or control air pollution commensurate with established air quality standards. This subdivision does not apply to that portion of the National Emission Standards for Hazardous Air Pollutants for asbestos that governs demolition and renovation as set out in 40 C.F.R. § 61.141, 61.145, 61.150, and 61.154 (1 July 1993 edition).

* * * * *

- (7) To develop and adopt standards and plans necessary to implement programs for the prevention of significant deterioration and for the attainment of air quality standards in nonattainment areas.

* * * * *

- (10) To develop and adopt standards and plans necessary to implement requirements of the federal Clean Air Act and implementing regulations adopted by the United States Environmental Protection Agency.

§ 143-215.107D. Emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) from certain coal-fired generating units.

(a) As used in this section:

- (1) "Coal-fired generating unit" means a coal-fired generating unit, as defined by 40 Code of Federal Regulations § 96.2 (1 July 2001 Edition), that is located in this State and has the capacity to generate 25 or more megawatts of electricity.
- (2) "Investor-owned public utility" means an investor-owned public utility, as defined in G.S. 62-3.

(b) An investor-owned public utility that owns or operates coal-fired generating units that collectively emitted more than 75,000 tons of oxides of nitrogen (NOx) in calendar year 2000:

- (1) Shall not collectively emit from the coal-fired generating units that it owns or operates more than 35,000 tons of oxides of nitrogen (NOx) in any calendar year beginning 1 January 2007.
- (2) Shall not collectively emit from the coal-fired generating units that it owns or operates more than 31,000 tons of oxides of nitrogen (NOx) in any calendar year beginning 1 January 2009.

(c) An investor-owned public utility that owns or operates coal-fired generating units that collectively emitted 75,000 tons or less of oxides of nitrogen (NOx) in calendar year 2000 shall not collectively emit from the coal-fired generating units that it owns or operates more than 25,000 tons of oxides of nitrogen (NOx) in any calendar year beginning 1 January 2007.

(d) An investor-owned public utility that owns or operates coal-fired generating units that collectively emitted more than 225,000 tons of sulfur dioxide (SO2) in calendar year 2000:

- (1) Shall not collectively emit from the coal-fired generating units that it owns or operates more than 150,000 tons of sulfur dioxide (SO2) in any calendar year beginning 1 January 2009.
- (2) Shall not collectively emit from the coal-fired generating units that it owns or operates more than 80,000 tons of sulfur dioxide (SO2) in any calendar year beginning 1 January 2013.

(e) An investor-owned public utility that owns or operates coal-fired generating units that collectively emitted 225,000 tons or less of sulfur dioxide (SO2) in calendar year 2000:

- (1) Shall not collectively emit from the coal-fired generating units that it owns or operates more than 100,000 tons of sulfur dioxide (SO2) in any calendar year beginning 1 January 2009.
- (2) Shall not collectively emit from the coal-fired generating units that it owns or operates more than 50,000 tons of sulfur dioxide (SO2) in any calendar year beginning 1 January 2013.

(f) Each investor-owned public utility to which this section applies may determine how it will achieve the collective emissions limitations imposed by this section. Compliance with the emissions limitations set out in this section does not alter the obligation of any person to comply with any other federal or State law, regulation, or rule related to air quality or visibility. This subsection shall not be construed to limit the authority of the Commission to impose specific limitations on the emission of oxides of nitrogen (NOx) and sulfur dioxide (SO2) from an individual coal-fired generating unit owned or operated by an investor-owned public utility.

(g) A coal-fired generating unit that is subject to the collective emissions limitations set out in this section on 1 July 2002 shall remain subject to the collective emissions limitations whether or not it thereafter continues to be owned or operated by an investor-owned public utility.

(h) The Commission shall require that any permit or modified permit issued for a coal-fired generating unit that is subject to this section include conditions that provide for testing, monitoring, record keeping, and reporting adequate to assure compliance with the requirements of this section.

(i) The Governor may enter into an agreement with an investor-owned public utility under which the investor-owned public utility voluntarily agrees to transfer to the State any emissions allowances acquired or that may be acquired by the investor-owned public utility pursuant to 42 U.S.C. §§ 7651-7651o, as implemented by 40 Code of Federal Regulations §§ 73.1 through 73.90 (1 July 2001 Edition); 42 U.S.C. 7410(a)(2)(D)(i)(I), as implemented by 40 Code of Federal Regulations § 51.121 (1 July 2001 Edition), related federal regulations, and the associated State Implementation Plan; 42 U.S.C. § 7426, as implemented by 40 Code of Federal Regulations § 52.34 (1 July 2001 Edition) and related federal regulations; or any similar program established under federal law that result from compliance with the emissions limitations set out in this section. An agreement entered into pursuant to this subsection shall be binding and shall be enforceable by specific performance. If the Governor enters into an agreement that provides for the transfer of emissions allowances to the State, the Governor shall file verified copies of the agreement with the Attorney General, the Secretary of State, the State Treasurer, the Secretary of Environment and Natural Resources, and the Utilities Commission. The State Treasurer shall hold all emissions allowances that are transferred to the State as provided in this subsection in trust for the people of this State and shall sell, trade, transfer, or otherwise dispose of the emissions allowances only as the General Assembly shall provide by law.

(j) An investor-owned public utility that is subject to the emissions limitations set out in this section shall submit to the Utilities Commission and to the Department on or before 1 April of each year a verified statement pursuant to subsection (i) of G.S. 62-133.6. (2002-4, s. 1.)

§ 143-215.108. Control of sources of air pollution; permits required.

(a) Except as provided in subsections (a1) and (a2) of this section, no person shall do any of the following things or carry out any of the following activities that contravene or will be likely to contravene standards established pursuant to G.S. 143-215.107 or set out in G.S. 143-215.107D unless that person has obtained a permit for the activity from the Commission and has complied with any conditions of the permit:

- (1) Establish or operate any air contaminant source, except as provided in G.S. 143-215.108A.
- (2) Build, erect, use, or operate any equipment that may result in the emission of an air contaminant or that is likely to cause air pollution, except as provided in G.S. 143-215.108A.
- (3) Alter or change the construction or method of operation of any equipment or process from which air contaminants are or may be emitted.
- (4) Repealed by Session Laws 2003-428, s. 1, effective August 19, 2003.

(a1) The Commission may by rule establish procedures that meet the requirements of section 502(b)(10) of Title V (42 U.S.C. § 7661a(b)(10)) and 40 Code of Federal Regulations §

70.4(b)(12) (1 July 1993 Edition) to allow a permittee to make changes within a permitted facility without requiring a revision of the permit.

(a2) The Commission may adopt rules that provide for a minor modification of a permit. At a minimum, rules that provide for a minor modification of a permit shall meet the requirements of 40 Code of Federal Regulations § 70.7(e)(2) (1 July 1993 Edition). If the Commission adopts rules that provide for a minor modification of a permit, a permittee shall not make a change in the permitted facility while the application for the minor modification is under review unless the change is authorized under the rules adopted by the Commission.

(b) The Commission shall act upon all applications for permits so as to effectuate the purposes of this Article by reducing existing air pollution and preventing, so far as reasonably possible, any increased pollution of the air from any additional or enlarged sources.

(c) The Commission shall have the power:

- (1) To grant and renew a permit with any conditions attached that the Commission believes necessary to achieve the purposes of this Article or the requirements of the Clean Air Act and implementing regulations adopted by the United States Environmental Protection Agency;
- (2) To grant and renew any temporary permit for such period of time as the Commission shall specify even though the action allowed by such permit may result in pollution or increase pollution where conditions make such temporary permit essential;
- (3) To terminate, modify, or revoke and reissue any permit upon not less than 60 days' written notice to any person affected;
- (3a) To suspend any permit pursuant to the provisions of G.S. 150B-3(c);
- (4) To require all applications for permits and renewals to be in writing and to prescribe the form of such applications;
- (5) To request such information from an applicant and to conduct such inquiry or investigation as it may deem necessary and to require the submission of plans and specifications prior to acting on any application for a permit;
- (5a) To require that an applicant satisfy the Department that the applicant, or any parent, subsidiary, or other affiliate of the applicant or parent:
 - a. Is financially qualified to carry out the activity for which a permit is required under subsection (a); and
 - b. Has substantially complied with the air quality and emission control standards applicable to any activity in which the applicant has previously engaged, and has been in substantial compliance with federal and state laws, regulations, and rules for the protection of the environment.

As used in this subdivision, the words "affiliate," "parent," and "subsidiary" have the same meaning as in 17 Code of Federal Regulations 240.12b-2 (1 April 1990 Edition);

- (6) To adopt rules, as it deems necessary, establishing the form of applications and permits and procedures for the granting or denial of permits and renewals pursuant to this section; and all permits, renewals and denials shall be in writing;

- (7) To prohibit any stationary source within the State from emitting any air pollutant in amounts that will prevent attainment or maintenance by any other state of any national ambient air quality standard or that will interfere with measures required to be included in the applicable implementation plan for any other state to prevent deterioration of air quality or protect visibility; and
 - (8) To designate certain classes of activities for which a general permit may be issued, after considering the environmental impact of an activity, the frequency of the activity, the need for individual permit oversight, and the need for public review and comment on individual permits.
- (d) (1) The Commission may conduct any inquiry or investigation it considers necessary before acting on an application and may require an applicant to submit plans, specifications, and other information the Commission considers necessary to evaluate the application. A permit application may not be deemed complete unless it is accompanied by a copy of the request for determination as provided in subsection (f) of this section that bears a date of receipt entered by the clerk of the local government and until the 15-day period for issuance of a determination has elapsed.
- (2) The Commission shall adopt rules specifying the times within which it must act upon applications for permits required by Title V and other permits required by this section. The times specified shall be extended for the period during which the Commission is prohibited from issuing a permit under subdivisions (3) and (4) of this subsection. The Commission shall inform a permit applicant as to whether or not the application is complete within the time specified in the rules for action on the application. If the Commission fails to act on an application for a permit required by Title V or this section within the time period specified, the failure to act on the application constitutes a final agency decision to deny the permit. A permit applicant, permittee, or other person aggrieved, as defined in G.S. 150B-2, may seek judicial review of a failure to act on the application as provided in G.S. 143-215.5 and Article 4 of Chapter 150B of the General Statutes. Notwithstanding the provisions of G.S. 150B-51, upon review of a failure to act on an application for a permit required by Title V or this section, a court may either: (i) affirm the denial of the permit or (ii) remand the application to the Commission for action upon the application within a specified time.
 - (3) If the Administrator of the United States Environmental Protection Agency validly objects to the issuance of a permit required by Title V within 45 days after the Administrator receives the proposed permit and the required portions of the permit application, the Commission shall not issue the permit until the Commission revises the proposed permit to meet all objections noted by the Administrator or otherwise satisfies all objections consistent with Title V and implementing regulations adopted by the United States Environmental Protection Agency.
 - (4) If the Administrator of the United States Environmental Protection Agency validly objects to the issuance of a permit required by Title V after the expiration of the 45-day review period specified in subdivision (3) of this

subsection as a result of a petition filed pursuant to section 505(b)(2) of Title V (42 U.S.C. § 7661d(b)(2)) and prior to the issuance of the permit by the Commission, the Commission shall not issue the permit until the Commission revises the proposed permit to meet all objections noted by the Administrator or otherwise satisfies all objections consistent with Title V and implementing regulations adopted by the United States Environmental Protection Agency.

(d1) No Title V permit issued pursuant to this section shall be issued or renewed for a term exceeding five years. All other permits issued pursuant to this section shall be issued for a term not to exceed eight years.

(e) A permit applicant or permittee who is dissatisfied with a decision of the Commission may commence a contested case by filing a petition under G.S. 150B-23 within 30 days after the Commission notifies the applicant or permittee of its decision. If the permit applicant or permittee does not file a petition within the required time, the Commission's decision on the application is final and is not subject to review.

(f) An applicant for a permit under this section for a new facility or for the expansion of a facility permitted under this section shall request each local government having jurisdiction over any part of the land on which the facility and its appurtenances are to be located to issue a determination as to whether the local government has in effect a zoning or subdivision ordinance applicable to the facility and whether the proposed facility or expansion would be consistent with the ordinance. The request to the local government shall be accompanied by a copy of the draft permit application and shall be delivered to the clerk of the local government personally or by certified mail. The determination shall be verified or supported by affidavit signed by the official designated by the local government to make the determination and, if the local government states that the facility is inconsistent with a zoning or subdivision ordinance, shall include a copy of the ordinance and the specific reasons for the determination of inconsistency. A copy of any such determination shall be provided to the applicant when it is submitted to the Commission. The Commission shall not act upon an application for a permit under this section until it has received a determination from each local government requested to make a determination by the applicant. If a local government determines that the new facility or the expansion of an existing facility is inconsistent with a zoning or subdivision ordinance, and unless the local government makes a subsequent determination of consistency with all ordinances cited in the determination or the proposed facility is determined by a court of competent jurisdiction to be consistent with the cited ordinances, the Commission shall attach as a condition of the permit a requirement that the applicant, prior to construction or operation of the facility under the permit, comply with all lawfully adopted local ordinances, including those cited in the determination, that apply to the facility at the time of construction or operation of the facility. If a local government fails to submit a determination to the Commission as provided by this subsection within 15 days after receipt of the request, the Commission may proceed to consider the permit application without regard to local zoning and subdivision ordinances. This subsection shall not be construed to affect the validity of any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance or to affect the responsibility of any person to comply with any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance. This subsection shall not be construed to limit any opportunity a local government may have to comment on a permit application under any other law or rule. This subsection shall not apply to any facility

with respect to which local ordinances are subject to review under either G.S. 104E-6.2 or G.S. 130A-293.

(g) Any person who is required to hold a permit under this section shall submit to the Department a written description of his current and projected plans to reduce the emission of air contaminants under such permit by source reduction or recycling. The written description shall accompany the payment of the annual permit fee. The written description shall also accompany any application for a new permit, or for modification of an existing permit, under this section. The written description required by this subsection shall not be considered part of a permit application and shall not serve as the basis for the denial of a permit or permit modification.

(h) Expedited Review of Applications Certified by a Professional Engineer. – The Commission shall adopt rules governing the submittal of permit applications certified by a professional engineer, including draft permits, that can be sent to public notice and hearing upon receipt and subjected to technical review by personnel within the Department. These rules shall specify, at a minimum, any forms to be used; a checklist for applicants that lists all items of information required to prepare a complete permit application; the form of the certification required on the application by a professional engineer; and the information that must be included in the draft permit. The Department shall process an application that is certified by a professional engineer as provided in subdivisions (1) through (7) of this subsection.

(1) Initiation of Review. – Upon receipt of an application certified by a professional engineer in accordance with this subsection and the rules adopted pursuant to this subsection, the Department shall determine whether the application is complete as provided in subdivision (2) of this subsection. Within 30 days after the date on which an application is determined to be complete, the Department shall:

- a. Publish any required notices, using the draft permit included with the application;
- b. Schedule any required public meetings or hearings on the application and permit; and
- c. Initiate any and all technical review of the application in a manner to ensure substantial completion of the technical review by the time of any public hearing on the application, or if there is no hearing, by the close of the notice period.

(2) Completeness Review. – Within 10 working days of receipt of the permit application certified by a professional engineer under this subsection, the Department shall determine whether the application is complete for purposes of this subsection. The Department shall determine whether the permit application certified by a professional engineer is complete by comparing the information provided in the application with the checklist contained in the rules adopted by the Commission pursuant to this subsection.

- a. If the application is not complete, the Department shall promptly notify the applicant in writing of all deficiencies of the application, specifying the items that need to be included, modified, or supplemented in order to make the application complete, and the 10-day time period is suspended after this request for further information. If the applicant submits the requested information within the time specified, the

10-day time period shall begin again on the day the additional information was submitted. If the additional information is not submitted within the time periods specified, the Department shall return the application to the applicant, and the applicant may treat the return of the application as a denial of the application or may resubmit the application at a later time.

- b. If the Department fails to notify the applicant that an application is not complete within the time period set forth in this subsection, the application shall be deemed to be complete.
- (3) Time for Permit Decision. – For any application found to be complete under subdivision (2) of this subsection, the Department shall issue a permit decision within 30 days of the last day of any public hearing on the application, or if there is no hearing, within 30 days of the close of the notice period.
 - (4) Rights if Permit Decision Not Made in Timely Fashion. – If the Department fails to issue a permit decision within the time periods specified in subdivision (3) of this subsection, the applicant may:
 - a. Take no action, thereby consenting to the continued review of the application; or
 - b. Treat the failure to issue a permit decision as a denial of the application and appeal the denial as provided in subdivision (2) of subsection (d) of this section.
 - (5) Power to Halt Review. – At any time after the permit application certified by a professional engineer has been determined to be complete under subdivision (2) of this subsection, the Department may immediately terminate review of that application, including technical review and any hearings or meetings scheduled on the application, upon a determination of one of the following:
 - a. The permit application is not in substantial compliance with the applicable rules; or
 - b. The applicant failed to pay all permit application fees.
 - (6) Rights if Review Halted. – If the Department terminates review of an application under subdivision (5) of this subsection, the applicant may take any of the following actions:
 - a. Revise and resubmit the application; or
 - b. Treat the action as a denial of the application and appeal the denial under Article 3 of Chapter 150B of the General Statutes.
 - (7) Option; No Additional Fee. – The submittal of a permit application certified by a professional engineer to be considered under this subsection shall be an option and shall not be required of any applicant. The Department shall not impose any additional fees for the receipt or processing of a permit application certified by a professional engineer.

(i) Rules for Review of Applications Other Than Those Certified by a Professional Engineer. – The Commission shall adopt rules governing the times of review for all permit applications submitted pursuant to this section other than those certified by a professional engineer pursuant to subsection (h) of this section. Those rules shall specify maximum times for, among other things, the following actions in reviewing the permit applications covered by this subsection:

- (1) Determining that the permit application is complete;
- (2) Requesting additional information to determine completeness;
- (3) Determining that additional information is needed to conduct a technical review of the application;
- (4) Completing all technical review of the permit application;
- (5) Holding and completing all public meetings and hearings required for the application;
- (6) Completing the record from reviewing and acting on the application; and
- (7) Taking final action on the permit, including granting or denying the application.
(1973, c. 821, s. 6; c. 1262, s. 23; 1979, c. 545, ss. 2, 3; 1987, c. 461, s. 2; c. 827, ss. 154, 206; 1989, c. 168, s. 30; c. 492; 1989 (Reg. Sess., 1990), c. 1037, s. 2; 1991, c. 552, s. 5; c. 629, s. 1; c. 761, s. 27(a)-(c); 1993, c. 400, s. 8; 1995, c. 484, s. 2; 1995 (Reg. Sess., 1996), c. 728, s. 1; 2002-4, s. 2; 2003-340, s. 1.8(b); 2003-428, ss. 1, 2; 2011-398, s. 60(a).)

§ 143-215.3. General powers of Commission and Department; auxiliary powers.

(a) Additional Powers. – In addition to the specific powers prescribed elsewhere in this Article, and for the purpose of carrying out its duties, the Commission shall have the power:

- (1) To make rules implementing Articles 21, 21A, 21B, or 38 of this Chapter.
 - (1a) To adopt fee schedules and collect fees for the following:
 - a. Processing of applications for permits or registrations issued under Article 21, other than Parts 1 and 1A, Articles 21A, 21B, and 38 of this Chapter;
 - b. Administering permits or registrations issued under Article 21, other than Parts 1 and 1A, Articles 21A, 21B, and 38 of this Chapter including monitoring compliance with the terms of those permits; and
 - c. Reviewing, processing, and publicizing applications for construction grant awards under the Federal Water Pollution Control Act.

No fee may be charged under this provision, however, to a farmer who submits an application that pertains to his farming operations.

- (1b) The fee to be charged pursuant to G.S. 143-215.3(a)(1a) for processing an application for a permit under G.S. 143-215.108 and G.S. 143-215.109 of Article 21B of this Chapter may not exceed five hundred dollars (\$500.00). The fee to be charged pursuant to G.S. 143-215.3(a)(1a) for processing a registration under Part 2A of this Article or Article 38 of this Chapter may not exceed fifty dollars (\$50.00) for any single registration. An additional fee of twenty percent (20%) of the registration processing fee may be assessed for a late registration under Article 38 of this Chapter. The fee for administering and compliance monitoring under Article 21, other than Parts 1 and 1A, and G.S. 143-215.108 and G.S. 143-215.109 of Article 21B shall be charged on an annual basis for each year of the permit term and may not exceed one thousand five hundred dollars (\$1,500) per year. Fees for processing all permits under Article 21A and all other sections of Article 21B shall not exceed one hundred dollars (\$100.00) for any single permit. The total

payment for fees that are set by the Commission under this subsection for all permits for any single facility shall not exceed seven thousand five hundred dollars (\$7,500) per year, which amount shall include all application fees and fees for administration and compliance monitoring. A single facility is defined to be any contiguous area under one ownership and in which permitted activities occur. For all permits issued under these Articles where a fee schedule is not specified in the statutes, the Commission, or other commission specified by statute shall adopt a fee schedule in a rule following the procedures established by the Administrative Procedure Act. Fee schedules shall be established to reflect the size of the emission or discharge, the potential impact on the environment, the staff costs involved, relative costs of the issuance of new permits and the reissuance of existing permits, and shall include adequate safeguards to prevent unusual fee assessments which would result in serious economic burden on an individual applicant. A system shall be considered to allow consolidated annual payments for persons with multiple permits. In its rulemaking to establish fee schedules, the Commission is also directed to consider a method of rewarding facilities which achieve full compliance with administrative and self-monitoring reporting requirements, and to consider, in those cases where the cost of renewal or amendment of a permit is less than for the original permit, a lower fee for the renewal or amendment.

- (1c) Moneys collected pursuant to G.S. 143-215.3(a)(1a) shall be used to:
- a. Eliminate, insofar as possible, backlogs of permit applications awaiting agency action;
 - b. Improve the quality of permits issued;
 - c. Improve the rate of compliance of permitted activities with environmental standards; and
 - d. Decrease the length of the processing period for permit applications.
- (1d) The Commission may adopt and implement a graduated fee schedule sufficient to cover all direct and indirect costs required for the State to develop and administer a permit program which meets the requirements of Title V. The provisions of subdivision (1b) of this subsection do not apply to the adoption of a fee schedule under this subdivision. In adopting and implementing a fee schedule, the Commission shall require that the owner or operator of all air contaminant sources subject to the requirement to obtain a permit under Title V to pay an annual fee, or the equivalent over some other period, sufficient to cover costs as provided in section 502(b)(3)(A) of Title V. The fee schedule shall be adopted according to the procedures set out in Chapter 150B of the General Statutes.
- a. The total amount of fees collected under the fee schedule adopted pursuant to this subdivision shall conform to the requirements of section 502(b)(3)(B) of Title V. No fee shall be collected for more than 4,000 tons per year of any individual regulated pollutant, as defined in section 502(b)(3)(B)(ii) of Title V, emitted by any source. Fees

collected pursuant to this subdivision shall be credited to the Title V Account.

- b. The Commission may reduce any permit fee required under this section to take into account the financial resources of small business stationary sources as defined under Title V and regulations promulgated by the United States Environmental Protection Agency.
 - c. When funds in the Title V Account exceed the total amount necessary to cover the cost of the Title V program for the next fiscal year, the Secretary shall reduce the amount billed for the next fiscal year so that the excess funds are used to supplement the cost of administering the Title V permit program in that fiscal year.
- (1e) The Commission shall collect the application, annual, and project fees for processing and administering permits, certificates of coverage under general permits, and certifications issued under Parts 1 and 1A of this Article and for compliance monitoring under Parts 1 and 1A of this Article as provided in G.S. 143-215.3D and G.S. 143-215.10G.
 - (2) To direct that such investigation be conducted as it may reasonably deem necessary to carry out its duties as prescribed by this Article or Article 21A or Article 21B of this Chapter, and for this purpose to enter at reasonable times upon any property, public or private, for the purpose of investigating the condition of any waters and the discharge therein of any sewage, industrial waste, or other waste or for the purpose of investigating the condition of the air, air pollution, air contaminant sources, emissions, or the installation and operation of any air-cleaning devices, and to require written statements or the filing of reports under oath, with respect to pertinent questions relating to the operation of any air-cleaning device, sewer system, disposal system, or treatment works. In the case of effluent or emission data, any records, reports, or information obtained under this Article or Article 21A or Article 21B of this Chapter shall be related to any applicable effluent or emission limitations or toxic, pretreatment, or new source performance standards. No person shall refuse entry or access to any authorized representative of the Commission or Department who requests entry for purposes of inspection, and who presents appropriate credentials, nor shall any person obstruct, hamper or interfere with any such representative while in the process of carrying out his official duties.
 - (3) To conduct public hearings and to delegate the power to conduct public hearings in accordance with the procedures prescribed by this Article or by Article 21B of this Chapter.
 - (4) To delegate such of the powers of the Commission as the Commission deems necessary to one or more of its members, to the Secretary or any other qualified employee of the Department. The Commission shall not delegate to persons other than its own members and the designated employees of the Department the power to conduct hearings with respect to the classification of waters, the assignment of classifications, air quality standards, air contaminant source classifications, emission control standards, or the issuance of any special order except in the case of an emergency under subdivision (12) of this

subsection for the abatement of existing water or air pollution. Any employee of the Department to whom a delegation of power is made to conduct a hearing shall report the hearing with its evidence and record to the Commission.

- (5) To institute such actions in the superior court of any county in which a violation of this Article, Article 21B of this Chapter, or the rules of the Commission has occurred, or, in the discretion of the Commission, in the superior court of the county in which any defendant resides, or has his or its principal place of business, as the Commission may deem necessary for the enforcement of any of the provisions of this Article, Article 21B of this Chapter, or of any official action of the Commission, including proceedings to enforce subpoenas or for the punishment of contempt of the Commission.
- (6) To agree upon or enter into any settlements or compromises of any actions and to prosecute any appeals or other proceedings.
- (7) To direct the investigation of any killing of fish and wildlife which, in the opinion of the Commission, is of sufficient magnitude to justify investigation and is known or believed to have resulted from the pollution of the waters or air as defined in this Article, and whenever any person, whether or not he shall have been issued a certificate of approval, permit or other document of approval authorized by this or any other State law, has negligently, or carelessly or unlawfully, or willfully and unlawfully, caused pollution of the waters or air as defined in this Article, in such quantity, concentration or manner that fish or wildlife are killed as the result thereof, the Commission, may recover, in the name of the State, damages from such person. The measure of damages shall be the amount determined by the Department and the North Carolina Wildlife Resources Commission, whichever has jurisdiction over the fish and wildlife destroyed to be the replacement cost thereof plus the cost of all reasonable and necessary investigations made or caused to be made by the State in connection therewith. Upon receipt of the estimate of damages caused, the Department shall notify the persons responsible for the destruction of the fish or wildlife in question and may effect such settlement as the Commission may deem proper and reasonable, and if no settlement is reached within a reasonable time, the Commission shall bring a civil action to recover such damages in the superior court in the county in which the discharge took place. Upon such action being brought the superior court shall have jurisdiction to hear and determine all issues or questions of law or fact, arising on the pleadings, including issues of liability and the amount of damages. On such hearing, the estimate of the replacement costs of the fish or wildlife destroyed shall be prima facie evidence of the actual replacement costs of such fish or wildlife. In arriving at such estimate, any reasonably accurate method may be used and it shall not be necessary for any agent of the Wildlife Resources Commission or the Department to collect, handle or weigh numerous specimens of dead fish or wildlife.

The State of North Carolina shall be deemed the owner of the fish or wildlife killed and all actions for recovery shall be brought by the Commission on behalf of

the State as the owner of the fish or wildlife. The fact that the person or persons alleged to be responsible for the pollution which killed the fish or wildlife holds or has held a certificate of approval, permit or other document of approval authorized by this Article or any other law of the State shall not bar any such action. The proceeds of any recovery, less the cost of investigation, shall be used to replace, insofar as and as promptly as possible, the fish and wildlife killed, or in cases where replacement is not practicable, the proceeds shall be used in whatever manner the responsible agency deems proper for improving the fish and wildlife habitat in question. Any such funds received are hereby appropriated for these designated purposes. Nothing in this paragraph shall be construed in any way to limit or prevent any other action which is now authorized by this Article.

- (8) After issuance of an appropriate order, to withhold the granting of any permit or permits pursuant to G.S. 143-215.1 or G.S. 143-215.108 for the construction or operation of any new or additional disposal system or systems or air-cleaning device or devices in any area of the State. Such order may be issued only upon determination by the Commission, after public hearing, that the permitting of any new or additional source or sources of water or air pollution will result in a generalized condition of water or air pollution within the area contrary to the public interest, detrimental to the public health, safety, and welfare, and contrary to the policy and intent declared in this Article or Article 21B of this Chapter. The Commission may make reasonable distinctions among the various sources of water and air pollution and may direct that its order shall apply only to those sources which it determines will result in a generalized condition of water or air pollution.

The determination of the Commission shall be supported by detailed findings of fact and conclusions set forth in the order and based upon competent evidence of record. The order shall describe the geographical area of the State affected thereby with particularity and shall prohibit the issuance of permits pending a determination by the Commission that the generalized condition of water or air pollution has ceased.

Notice of hearing shall be given in accordance with the provisions of G.S. 150B-21.2. A person aggrieved by an order of the Commission under this subdivision may seek judicial review of the order under Article 4 of Chapter 150B of the General Statutes without first commencing a contested case. An order may not be stayed while it is being reviewed.

- (9) If an investigation conducted pursuant to this Article or Article 21B of this Chapter reveals a violation of any rules, standards, or limitations adopted by the Commission pursuant to this Article or Article 21B of this Chapter, or a violation of any terms or conditions of any permit issued pursuant to G.S. 143-215.1 or 143-215.108, or special order or other document issued pursuant to G.S. 143-215.2 or G.S. 143-215.110, the Commission may assess the reasonable costs of any investigation, inspection or monitoring survey which revealed the violation against the person responsible therefor. If the violation resulted in an unauthorized discharge to the waters or atmosphere of the State,

the Commission may also assess the person responsible for the violation for any actual and necessary costs incurred by the State in removing, correcting or abating any adverse effects upon the water or air resulting from the unauthorized discharge. If the person responsible for the violation refuses or fails within a reasonable time to pay any sums assessed, the Commission may institute a civil action in the superior court of the county in which the violation occurred or, in the Commission's discretion, in the superior court of the county in which such person resides or has his or its principal place of business, to recover such sums.

(10) To require a laboratory facility that performs any tests, analyses, measurements, or monitoring required under this Article or Article 21B of this Chapter to be certified annually by the Department, to establish standards that a laboratory facility and its employees must meet and maintain in order for the laboratory facility to be certified, and to charge a laboratory facility a fee for certification. Fees collected under this subdivision shall be credited to the Water and Air Account and used to administer this subdivision. These fees shall be applied to the cost of certifying commercial, industrial, and municipal laboratory facilities.

(11) Repealed by Session Laws 1983, c. 296, s. 6.

(12) To declare an emergency when it finds that a generalized condition of water or air pollution which is causing imminent danger to the health or safety of the public. Regardless of any other provisions of law, if the Department finds that such a condition of water or air pollution exists and that it creates an emergency requiring immediate action to protect the public health and safety or to protect fish and wildlife, the Secretary of the Department with the concurrence of the Governor, shall order persons causing or contributing to the water or air pollution in question to reduce or discontinue immediately the emission of air contaminants or the discharge of wastes. Immediately after the issuance of such order, the chairman of the Commission shall fix a place and time for a hearing before the Commission to be held within 24 hours after issuance of such order, and within 24 hours after the commencement of such hearing, and without adjournment thereof, the Commission shall either affirm, modify or set aside the order.

In the absence of a generalized condition of air or water pollution of the type referred to above, if the Secretary finds that the emissions from one or more air contaminant sources or the discharge of wastes from one or more sources of water pollution is causing imminent danger to human health and safety or to fish and wildlife, he may with the concurrence of the Governor order the person or persons responsible for the operation or operations in question to immediately reduce or discontinue the emissions of air contaminants or the discharge of wastes or to take such other measures as are, in his judgment, necessary, without regard to any other provisions of this Article or Article 21B of this Chapter. In such event, the requirements for hearing and affirmance, modification or setting aside of such orders set forth in the preceding paragraph of this subdivision shall apply.

- (13) Repealed by Session Laws 1983, c. 296, s. 6.
- (14) To certify and approve, by appropriate delegations and conditions in permits required by G.S. 143-215.1, requests by publicly owned treatment works to implement, administer and enforce a pretreatment program for the control of pollutants which pass through or interfere with treatment processes in such treatment works; and to require such programs to be developed where necessary to comply with the Federal Water Pollution Control Act and the Resource Conservation and Recovery Act, including the addition of conditions and compliance schedules in permits required by G.S. 143-215.1. Pretreatment programs submitted by publicly owned treatment works shall include, at a minimum, the adoption of pretreatment standards, a permit or equally effective system for the control of pollutants contributed to the treatment works, and the ability to effectively enforce compliance with the program.
- (15) To adopt rules for the prevention of pollution from underground tanks containing petroleum, petroleum products, or hazardous substances. Rules adopted under this section may incorporate standards and restrictions which exceed and are more comprehensive than comparable federal regulations.
- (16) To adopt rules limiting the manufacture, storage, sale, distribution or use of cleaning agents containing phosphorus pursuant to G.S. 143-214.4(e), and to adopt rules limiting the manufacture, storage, sale, distribution or use of cleaning agents containing nitrilotriacetic acid.
- (17) To adopt rules to implement Part 2A of Article 21A of Chapter 143.

(b) Research Functions. – The Department shall have the power to conduct scientific experiments, research, and investigations to discover economical and practical corrective methods for air pollution and waste disposal problems. To this end, the Department may cooperate with any public or private agency or agencies in the conduct of such experiments, research, and investigations, and may, when funds permit, establish research studies in any North Carolina educational institution, with the consent of such institution. In addition, the Department shall have the power to cooperate and enter into contracts with technical divisions of State agencies, institutions and with municipalities, industries, and other persons in the execution of such surveys, studies, and research as it may deem necessary in fulfilling its functions under this Article or Article 21B of this Chapter. All State departments shall advise with and cooperate with the Department on matters of mutual interest.

(c) Relation with the Federal Government. – The Commission as official water and air pollution control agency for the State is delegated to act in local administration of all matters covered by any existing federal statutes and future legislation by Congress relating to water and air quality control. In order for the State of North Carolina to effectively participate in programs administered by federal agencies for the regulation and abatement of water and air pollution, the Department is authorized to accept and administer funds provided by federal agencies for water and air pollution programs and to enter into contracts with federal agencies regarding the use of such funds.

(d) Relations with Other States. – The Commission or the Department may, with the approval of the Governor, consult with qualified representatives of adjoining states relative to the

establishment of regulations for the protection of waters and air of mutual interest, but the approval of the General Assembly shall be required to make any regulations binding.

(e) Variances. – Any person subject to the provisions of G.S. 143-215.1 or 143-215.108 may apply to the Commission for a variance from rules, standards, or limitations established pursuant to G.S. 143-214.1, 143-215, or 143-215.107. The Commission may grant such variance, for fixed or indefinite periods after public hearing on due notice, or where it is found that circumstances so require, for a period not to exceed 90 days without prior hearing and notice. Prior to granting a variance hereunder, the Commission shall find that:

- (1) The discharge of waste or the emission of air contaminants occurring or proposed to occur do not endanger human health or safety; and
- (2) Compliance with the rules, standards, or limitations from which variance is sought cannot be achieved by application of best available technology found to be economically reasonable at the time of application for such variances, and would produce serious hardship without equal or greater benefits to the public, provided that such variances shall be consistent with the provisions of the Federal Water Pollution Control Act as amended or the Clean Air Act as amended; and provided further, that any person who would otherwise be entitled to a variance or modification under the Federal Water Pollution Control Act as amended or the Clean Air Act as amended shall also be entitled to the same variance from or modification in rules, standards, or limitations established pursuant to G.S. 143-214.1, 143-215, and 143-215.107, respectively.

(f) Notification of Completed Remedial Action. – The definitions set out in G.S. 130A-310.31(b) apply to this subsection. Any person may submit a written request to the Department for a determination that groundwater has been remediated to meet the standards and classifications established under this Part. A request for a determination that groundwater has been remediated to meet the standards and classifications established under this Part shall be accompanied by the fee required by G.S. 130A-310.39(a)(2). If the Department determines that groundwater has been remediated to established standards and classifications, the Department shall issue a written notification that no further remediation of the groundwater will be required. The notification shall state that no further remediation of the groundwater will be required unless the Department later determines, based on new information or information not previously provided to the Department, that the groundwater has not been remediated to established standards and classifications or that the Department was provided with false or incomplete information. Under any of those circumstances, the Department may withdraw the notification and require responsible parties to remediate the groundwater to established standards and classifications. (1951, c. 606; 1957, c. 1267, s. 3; 1959, c. 779, s. 8; 1963, c. 1086; 1967, c. 892, s. 1; 1969, c. 538; 1971, c. 1167, ss. 7, 8; 1973, c. 698, ss. 1-7, 9, 17; c. 712, s. 1; c. 1262, ss. 23, 86; c. 1331, s. 3; 1975, c. 583, ss. 5, 6; c. 655, s. 3; 1977, c. 771, s. 4; 1979, c. 633, ss. 6-8; 1979, 2nd Sess., c. 1158, ss. 1, 3, 4; 1983, c. 296, ss. 5-8; 1985, c. 551, s. 2; 1987, c. 111, s. 2; c. 767, s. 1; c. 827, ss. 1, 154, 161, 266; 1987 (Reg. Sess., 1988), c. 1035, s. 2; 1989, c. 500, s. 122; c. 652, s. 1; 1991, c. 552, ss. 2, 11; c. 712, s. 2; 1991 (Reg. Sess., 1992), c. 890, s. 16; c. 1039, ss. 14, 20.1; 1993, c. 344, s. 2; c. 400, ss. 1(c), 2, 3, 15; c. 496, s. 4; 1993 (Reg. Sess., 1994), c. 694, s. 1; 1995, c. 484, s. 5; 1997-357, s. 6; 1997-496, s. 4; 1998-212, s. 29A.11(b).)

§ 143B-283. Environmental Management Commission – members; selection; removal; compensation; quorum; services.

(a) The Environmental Management Commission shall consist of 13 members appointed by the Governor. The Governor shall select the members so that the membership of the Commission shall consist of:

- (1) One who shall be a licensed physician with specialized training and experience in the health effects of environmental pollution;
- (2) One who shall, at the time of appointment, be actively connected with the Commission for Public Health or local board of health or have experience in health sciences;
- (3) One who shall, at the time of appointment, be actively connected with or have had experience in agriculture;
- (4) One who shall, at the time of appointment, be a registered engineer with specialized training and experience in water supply or water or air pollution control;
- (5) One who shall, at the time of appointment, be actively connected with or have had experience in the fish and wildlife conservation activities of the State;
- (6) One who shall, at the time of appointment, have special training and scientific expertise in hydrogeology or groundwater hydrology;
- (7) Three members interested in water and air pollution control, appointed from the public at large;
- (8) One who shall, at the time of appointment, be actively employed by, or recently retired from, an industrial manufacturing facility and knowledgeable in the field of industrial air and water pollution control;
- (9) One who shall, at the time of appointment, be actively connected with or have had experience in pollution control problems of municipal or county government;
- (10) One who shall, at the time of appointment, have special training and scientific expertise in air pollution control and the effects of air pollution; and
- (11) One who shall, at the time of appointment, have special training and scientific expertise in freshwater, estuarine, marine biological, or ecological sciences.

(b) Members appointed by the Governor shall serve terms of office of six years. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term. The Governor may reappoint a member of the Commission to an additional term if, at the time of the reappointment, the member qualifies for membership on the Commission under subsection (a) of this section.

(b1) The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance, or nonfeasance in accordance with the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

(b2) The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(b3) A majority of the Commission shall constitute a quorum for the transaction of business.

(b4) All clerical and other services required by the Commission shall be supplied by the Secretary of Environment and Natural Resources.

(c) Nine of the members appointed by the Governor under this section shall be persons who do not derive any significant portion of their income from persons subject to permits or enforcement orders under this Chapter. The Governor shall require adequate disclosure of potential conflicts of interest by members. The Governor, by executive order, shall promulgate criteria regarding conflicts of interest and disclosure thereof for determining the eligibility of persons under this section, giving due regard to the requirements of federal legislation, and for this purpose may promulgate rules, regulations or guidelines in conformance with those established by any federal agency interpreting and applying provisions of federal law.

(d) In addition to the members designated by subsection (a) of this section, the General Assembly shall appoint six members, three upon the recommendation of the Speaker of the House of Representatives, and three upon the recommendation of the President Pro Tempore of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. Members appointed by the General Assembly shall serve terms of two years. (1973, c. 1262, s. 20; 1977, c. 771, s. 4; 1979, 2nd Sess., c. 1158, ss. 5, 6; 1981 (Reg. Sess., 1982), c. 1191, s. 19; 1989, c. 315; c. 727, s. 218(129); 1995, c. 490, s. 18; 1997-381, s. 1; 1997-443, s. 11A.119(a); 1998-217, s. 17; 2000-172, ss. 4.1, 4.2; 2001-486, s. 2.16; 2007-182, s. 2.)

§ 150B-21.1. Procedure for adopting a temporary rule.

(a) Adoption. – An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A recent federal regulation.
- (5) A recent court order.
- (6) The need for a rule establishing review criteria as authorized by G.S. 131E-183(b) to complement or be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan, and the proposed rule and a notice of public hearing is submitted to the Codifier of Rules prior to the effective date of the Plan.
- (7) The need for the Wildlife Resources Commission to establish any of the following:
 - a. No wake zones.
 - b. Hunting or fishing seasons.
 - c. Hunting or fishing bag limits.
 - d. Management of public game lands as defined in G.S. 113-129(8a).
- (8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes, to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association, Inc., for the purpose of

promoting uniformity of state securities regulation, and to adopt rules governing the conduct of hearings pursuant to this Chapter.

- (9) The need for the Commissioner of Insurance to implement the provisions of G.S. 58-2-205.
 - (10) The need for the Chief Information Officer to implement the information technology procurement provisions of Article 3D of Chapter 147 of the General Statutes.
 - (11) The need for the State Board of Elections to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:
 - a. In accordance with the provisions of G.S. 163-22.2.
 - b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.
 - c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.
 - (12) The need for an agency to adopt a temporary rule to implement the provisions of any of the following acts until all rules necessary to implement the provisions of the act have become effective as either temporary or permanent rules:
 - a. Repealed by Session Laws 2000-148, s. 5, effective July 1, 2002.
 - b. Repealed by Session Laws 2000-69, s. 5, effective July 1, 2003.
 - (13), (14) Reserved.
 - (15) Expired pursuant to Session Laws 2002-164, s. 5, effective October 1, 2004.
 - (16) Expired pursuant to Session Laws 2003-184, s. 3, effective July 1, 2005.
- (a1) Recodified as subdivision (a)(16) of this section by Session Laws 2004-156, s. 1.
- (a2) A recent act, change, regulation, or order as used in subdivisions (2) through (5) of subsection (a) of this section means an act, change, regulation, or order occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission. Upon written request of the agency, the Commission may waive the 210-day requirement upon consideration of the degree of public benefit, whether the agency had control over the circumstances that required the requested waiver, notice to and opposition by the public, the need for the waiver, and previous requests for waivers submitted by the agency.
- (a3) Unless otherwise provided by law, the agency shall:
- (1) At least 30 business days prior to adopting a temporary rule, submit the rule and a notice of public hearing to the Codifier of Rules, and the Codifier of Rules shall publish the proposed temporary rule and the notice of public hearing on the Internet to be posted within five business days.
 - (2) At least 30 business days prior to adopting a temporary rule, notify persons on the mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule and of the public hearing.
 - (3) Accept written comments on the proposed temporary rule for at least 15 business days prior to adoption of the temporary rule.
 - (4) Hold at least one public hearing on the proposed temporary rule no less than five days after the rule and notice have been published.
- (a4) An agency must also prepare a written statement of its findings of need for a temporary rule stating why adherence to the notice and hearing requirements in G.S. 150B-21.2 would be

contrary to the public interest and why the immediate adoption of the rule is required. If the temporary rule establishes a new fee or increases an existing fee, the agency shall include in the written statement that it has complied with the requirements of G.S. 12-3.1. The statement must be signed by the head of the agency adopting the temporary rule.

(b) Review. – When an agency adopts a temporary rule it must submit the rule and the agency's written statement of its findings of the need for the rule to the Rules Review Commission. Within 15 business days after receiving the proposed temporary rule, the Commission shall review the agency's written statement of findings of need for the rule and the rule to determine whether the statement meets the criteria listed in subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9. The Commission shall direct a member of its staff who is an attorney licensed to practice law in North Carolina to review the statement of findings of need and the rule. The staff member shall make a recommendation to the Commission, which must be approved by the Commission or its designee. The Commission's designee shall be a panel of at least three members of the Commission. In reviewing the statement, the Commission or its designee may consider any information submitted by the agency or another person. If the Commission or its designee finds that the statement meets the criteria listed in subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9, the Commission or its designee must approve the temporary rule and deliver the rule to the Codifier of Rules within two business days of approval. The Codifier of Rules must enter the rule into the North Carolina Administrative Code on the sixth business day following receipt from the Commission or its designee.

(b1) If the Commission or its designee finds that the statement does not meet the criteria listed in subsection (a) of this section or that the rule does not meet the standards in G.S. 150B-21.9, the Commission or its designee must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Commission or its designee must review the additional findings or new statement within five business days after the agency submits the additional findings or new statement. If the Commission or its designee again finds that the statement does not meet the criteria listed in subsection (a) of this section or that the rule does not meet the standards in G.S. 150B-21.9, the Commission or its designee must immediately notify the head of the agency and return the rule to the agency.

(b2) If an agency decides not to provide additional findings or submit a new statement when notified by the Commission or its designee that the agency's findings of need for a rule do not meet the required criteria or that the rule does not meet the required standards, the agency must notify the Commission or its designee of its decision. The Commission or its designee shall then return the rule to the agency. When the Commission returns a rule to an agency in accordance with this subsection, the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes.

(b3) Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. – A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this

section and whether the rule meets the standards in G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

(c1) Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the following dates:

- (1) The date specified in the rule.
- (2) The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.
- (3) The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.
- (4) The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.
- (5) 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.

(e) Publication. – When the Codifier of Rules enters a temporary rule in the North Carolina Administrative Code, the Codifier must publish the rule in the North Carolina Register. (1973, c. 1331, s. 1; 1981, c. 688, s. 12; 1981 (Reg. Sess., 1982), c. 1232, s. 1; 1983, c. 857; c. 927, ss. 4, 8; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), 1(8); 1987, c. 285, ss. 10-12; 1991, c. 418, s. 1; 1991 (Reg. Sess., 1992), c. 900, s. 149; 1993, c. 553, s. 54; 1995, c. 507, s. 27.8(c); 1996, 2nd Ex. Sess., c. 18, ss. 7.10(c), (d); 1997-403, ss. 1-3; 1998-127, s. 2; 1998-212, s. 26B(h); 1999-434, s. 16; 1999-453, s. 5(a); 2000-69, ss. 3, 5; 2000-148, ss. 4, 5; 2001-126, s. 12; 2001-421, ss. 2.3, 5.3; 2001-424, ss. 27.17(b), (c), 27.22(a), (b); 2001-487, s. 21(g); 2002-97, ss. 2, 3; 2002-164, s. 4.6; 2003-184, s. 3; 2003-229, s. 2; 2003-413, ss. 27, 29; 2004-156, s. 1; 2011-398, s. 4.)

§ 150B-21.2. Procedure for adopting a permanent rule.

(a) Steps. – Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:

- (1) Publish a notice of text in the North Carolina Register.
- (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.
- (3) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
- (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
- (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

(b) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.

(c) Notice of Text. – A notice of the proposed text of a rule must include all of the following:

- (1) The text of the proposed rule.

- (2) A short explanation of the reason for the proposed rule and a link to the agency's Web site containing the information required by G.S. 150B-19.1(c).
- (3) A citation to the law that gives the agency the authority to adopt the rule.
- (4) The proposed effective date of the rule.
- (5) The date, time, and place of any public hearing scheduled on the rule.
- (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
- (7) The period of time during which and the person to whom written comments may be submitted on the proposed rule.
- (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
- (9) The procedure by which a person can object to a proposed rule and the requirements for subjecting a proposed rule to the legislative review process.

(d) Mailing List. – An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice or text to each person on the mailing list who has requested notice on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. – An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency shall publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. – An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

(g) Adoption. – An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency shall review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note.

An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. – An agency must issue a concise written statement explaining why the agency adopted a rule if, within 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. – An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, any fiscal note that has been prepared for the rule, and any written explanation made by the agency for adopting the rule. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 63; 1977, c. 915, s. 2; 1983, c. 927, ss. 3, 7; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), (7); 1987, c. 285, ss. 7-9; 1989, c. 5, s. 1; 1991, c. 418, s. 1; 1995, c. 507, s. 27.8(d); 1996, 2nd Ex. Sess., c. 18, s. 7.10(e); 2003-229, s. 4; 2011-398, s. 5.)

Attachment 3

**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)
2008 Lead Requirements**

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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 2008 lead national ambient air quality standards. Below is a table of contents of the reference documents used.

USEPA October 14, 2011 memorandum, "Guidance on Infrastructure State Implementation Plan (SIP) Elements Required Under Section 110(a)(1) and (2) for the 2008 Lead (Pb) National Ambient Air Quality Standards (NAAQS)."	2
USEPA November 7, 2011 memorandum, "The Estimated Contribution of Ambient Lead (Pb) to Class I Area Visibility Impairment"	23
USEPA April 6, 2011, memorandum, "Regional Consistency for the Administrative Requirements of State Implementation Plan Submittals and the Use of Letter Notices."	26
USEPA Federal Register notice, May 19, 2010, California's legal authority (75 FR 27938).....	39



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

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
Stephen D. Page
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 ($\mu\text{g}/\text{m}^3$) to $0.15 \mu\text{g}/\text{m}^3$. 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 $\text{PM}_{2.5}$, 1997 8-hour ozone, and 2006 $\text{PM}_{2.5}$ 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

**Guidance on Section 110 Infrastructure SIPs
for the 2008 Pb NAAQS**

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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/m₃, 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."

11/7/2011

MEMORANDUM

SUBJECT: The Estimated Contribution of Ambient Lead (Pb) to Class I Area Visibility Impairment

FROM: Mark Schmidt, OAR/OAQPS/AQAD

TO: File

Overview:

This memorandum provides rough estimates of Pb-associated visibility impairment levels in mandatory Class I Federal areas, and the corresponding proportions of those estimated levels to associated total visibility impairment. Pertinent background information, underlying analysis assumptions, and descriptions of the implemented analysis tasks are summarized in bullet form below:

- The Clean Air Act establishes a Regional Haze Program which is intended to improve and protect visibility in mandatory Class I Federal areas. Mandatory Class I Federal areas include certain national parks (larger than 6000 acres), wilderness areas (larger than 5000 acres), national memorial parks (over 500 acres), and other areas of special national and cultural significance.
- The National Park Service operates an ambient air monitoring program called “IMPROVE” (Interagency Monitoring of Protected Visual Environments) with a primary objective of characterizing visibility impairment in Class 1 and other similar areas.
- The IMPROVE program has developed assorted equations for estimating visibility impairment in mostly non-urban environments. The original, and still widely accepted IMPROVE formula for estimating visibility impairment, calculates “24-hour average total light extinction” (in units of inverse megameters) from inputs of 1) 24-hour average concentrations of select speciated PM_{2.5} components (some of which are used in reported form in the equation and others which are transformed to the explicit formula variables via additional simple equations; 2) 24-hour average concentration estimates of PM_{10-2.5} (a.k.a., “PM-coarse”), and 3) estimates of the hygroscopic impacts of relative humidity on associated ambient inputs, specifically sulfate and nitrate. The calculated light extinction formula is:

$$PMb_{ext;i} = (3 \times Sulfate_i \times f(RH)_i) + (3 \times Nitrate_i \times f(RH)_i) + (4 \times OM_i) + (10 \times EC_i) + (FS_i) + (0.6 \times PMc) + 10$$

Where:

$PMb_{ext;i}$	=	PM-related light extinction in Mm^{-1} for day i ; and
$Sulfate_i$	=	ammonium sulfate (reported concentration of sulfate ion * 1.375) for day i ; and
$Nitrate_i$	=	ammonium nitrate (reported concentration of nitrate ion * 1.29) for day i ; and
OM_i	=	organic mass (blank-adjusted reported concentration of organic carbon * 1.4) for day i ; and
EC_i	=	the reported concentration of elemental carbon for day i ; and
FS_i	=	fine soil (reported concentration of Al * 2.20 + reported concentration of Si * 2.49 + reported concentration of Ca * 1.63 + reported concentration of Fe * 2.42 + reported concentration of Ti * 1.94) for day i ; and
PMc_i	=	PM_coarse (reported PM ₁₀ concentration – reported PM _{2.5} concentration) for day i ; and
10	=	the “Rayleigh” factor which is assumed light reflection from gasses; and
$f(RH)_i$	=	the RH hygroscopic growth factor as determined from the EPA climatological $f(RH)$ database corresponding to the month of day i for the grid point closest in distance to the monitoring site.

11/7/2011

- In this analysis, the above formula was used to estimate 24-hour average total light extinction at all IMPROVE sites for days (containing all formula components) in years 2007-2009. The formula was also used to estimate 24-hour average total light extinction at all Chemical Speciation Network (CSN) sites for the same time-frame (for days containing all formula components). As opposed to the IMPROVE network which encompasses monitors in predominately non-urban areas, the CSN network is mostly urban-based. CSN sites were used in addition to IMPROVE sites in order to obtain more light extinction estimates (and make the anticipated conclusion more robust), but because sulfate, nitrate, and carbon concentrations are typically much higher in urban areas than in non-urban areas and because those light extinction formula components generally constitute the majority share of light extinction estimates (as opposed to the fine soil and PM-coarse concentrations), the light extinction estimates calculated at CSN sites are thought to be upper bound estimates of the absolute levels expected in Class 1 areas.
- To estimate the portion of light extinction associated with Pb, only two of the IMPROVE formula components were used as shown below. 24-hour average concentrations of PM_{2.5}_Pb were used as the fine soil factor, and 24-hour average concentrations of PM_{10-2.5}_Pb were used as the PM_coarse factor. Because PM₁₀_Pb is not monitored at many sites, but the larger size-cut TSP_Pb is (since the Pb NAAQS is based on that indicator), TSP_Pb 24-hour average concentrations were used as a conservative surrogate for 24-hour average PM₁₀_Pb in the computation of site-day 24-hour average PM_{10-2.5}_Pb. Only site-days (2007-2009) with both PM_{2.5}_Pb and PM_{10-2.5}_Pb estimates were used in the analysis.

$$PM_Pb b_{ext;i} = (FS_i) + (0.6 \times PM_coarse)$$

Where:

$PM_Pb b_{ext;i}$	=	PM_Pb-related light extinction in Mm ⁻¹ for day <i>i</i> ; and
FS_i	=	fine soil (reported concentration of PM _{2.5} _Pb) for day <i>i</i> ; and
PMc_i	=	PM_Pb_coarse (reported PM ₁₀ _Pb concentration – reported PM _{2.5} _Pb concentration) for day <i>i</i> . If

- As with the processing of calculated total light extinction, the above equation for calculated Pb-associated light extinction was applied to data for both IMPROVE and CSN sites. As with the total extinction estimates, the CSN Pb-associated extinction estimates are thought to be an upper bound as to what would be expected in Class I areas.
- The site-day estimates of total light extinction and Pb-associated light extinction were then matched by site-day and only site-days with both estimates present (total and Pb-associated) were used in the subsequent summarizations. For each site-day in the matched file, the ratio of Pb-associated light extinction to total light extinction was computed.
- Consistent with the Regional Haze Program, the implemented summarizations focused on the 20 percent best and worst visibility days (as determined with regard to site-level total calculated PM-light extinction). For each site in the matched file, the 20th and 80th percentiles for total calculated PM-light extinction were determined. No data completeness cutoff was imposed. The daily extinction estimates and corresponding ratio were then averaged by site-category (i.e., those where the total extinction was >= the 80th percentile, those where the total extinction was <= the 20th percentile, and those where the total extinction was in between the 20th and 80th percentiles). The site-category averages for total extinction and for Pb-associated extinction were then averaged nationally by network-category.

11/7/2011

Results and Conclusion:

- The results of the described analysis are shown below. Although the CSN estimates for total light extinction and Pb-associated light extinction are significantly higher than the corresponding estimates at IMPROVE sites, the ratios of the two extinction estimates were quite comparable for both networks. For the high extinction days (best 20% based on site-level total extinction), ambient Pb contributed 0.01 percent, on average, to total light extinction in both networks. For the low extinction days (worst 20% based on site-level total extinction), ambient Pb contributed 0.03 percent, on average, to total light extinction in both networks. For the “other” days (where total extinction was between the 20th and 80th percentiles), ambient Pb contributed around 0.02 percent, on average, to total light extinction in both networks.
- In conclusion, it appears that the Pb-related visibility effects (in Class I and other areas) are insignificant in comparison to those associated with sulfate, nitrate, and carbon PM.

IMPROVE: 164 sites (with all components) CSN: 117 sites (with all components)

	Bext24_total	Bext24_Pb	ratio of Bext24_Pb to Bext24_total
average of high days	59.10879	0.00783	0.00013
median of high days	44.10702	0.00551	0.00011

	Bext24_total	Bext24_Pb	ratio of Bext24_Pb to Bext24_total
average of high days	140.93796	0.01998	0.00013
median of high days	135.79025	0.01216	0.00010

	Bext24_total	Bext24_Pb	ratio of Bext24_Pb to Bext24_total
average of low days	10.42402	0.00255	0.00026
median of low days	7.20448	0.00162	0.00023

	Bext24_total	Bext24_Pb	ratio of Bext24_Pb to Bext24_total
average of low days	32.14398	0.00820	0.00027
median of low days	32.25639	0.00756	0.00025

	Bext24_total	Bext24_Pb	ratio of Bext24_Pb to Bext24_total
average of other days	25.45386	0.00472	0.00020
median of other days	18.49656	0.00350	0.00018

	Bext24_total	Bext24_Pb	ratio of Bext24_Pb to Bext24_total
average of other days	68.02410	0.01185	0.00017
median of other days	68.00097	0.00876	0.00014



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.

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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

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

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 Irrigated 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

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.

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

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 SIP. 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

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.

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

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.

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