



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2012-0228; FRL-9657-5]

**Approval and Promulgation of State Implementation Plans; Hawaii;
Infrastructure Requirements for the 1997 8-Hour Ozone and the
1997 and 2006 Fine Particulate Matter National Ambient Air
Quality Standards**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to partially approve and partially disapprove a State Implementation Plan (SIP) revision submitted by the State of Hawaii pursuant to the requirements of Section 110(a)(1) and (2) of the Clean Air Act (CAA) for the 1997 8-hour ozone national ambient air quality standards (NAAQS) and the 1997 and 2006 NAAQS for fine particulate matter (PM_{2.5}). Section 110(a) of the CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by the EPA. On December 14, 2011, the Hawaii Department of Health (HDOH) submitted a revision to Hawaii's SIP, which describes the State's provisions for implementing,

maintaining, and enforcing standards listed above. We are taking comments on this proposal and plan to follow with a final action.

DATES: Written comments must be received on or before [**Insert date 30 days after publication in the Federal Register**].

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-R09-OAR-2012-0228, by one of the following methods:

1. *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.
2. *E-mail*: richmond.dawn@epa.gov
3. *Fax*: 415-947-3579
4. *Mail or deliver*: Dawn Richmond, Air Planning Office (AIR-2), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901. Deliveries are only accepted during the Regional Office's normal hours of operation.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and

should not be submitted through <http://www.regulations.gov> or e-mail. <http://www.regulations.gov> is an anonymous access system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The index to the docket for this action is available electronically at <http://www.regulations.gov> and 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 directly below.

FOR FURTHER INFORMATION CONTACT: Dawn Richmond, Air Planning Office (AIR-2), U.S. Environmental Protection Agency, Region IX, (415) 972-3207, richmond.dawn@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, the terms ``we,`` ``us,`` and ``our`` refer to EPA.

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I. Background

A. Statutory Framework

Section 110(a)(1) of the CAA requires states to make a SIP submission "within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)," that provides for the "implementation, maintenance, and enforcement" of such NAAQS. Section 110(a)(2) includes a list of specific elements that "[e]ach such plan" submission must meet. 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 SIP submittals that address these requirements are referred to

as "infrastructure SIPs." These infrastructure SIP elements include:

- Section 110(a)(2)(A): Emission limits and other control measures.
- Section 110(a)(2)(B): Ambient air quality monitoring/data system.
- Section 110(a)(2)(C): Program for enforcement of control measures and regulation of new stationary sources.
- Section 110(a)(2)(D)(i): Interstate pollution transport.
- Section 110(a)(2)(D)(ii): Interstate and international pollution abatement.
- Section 110(a)(2)(E): Adequate resources and authority, conflict of interest, and oversight of local governments and regional agencies.
- Section 110(a)(2)(F): Stationary source monitoring and reporting.
- Section 110(a)(2)(G): Emergency episodes.
- Section 110(a)(2)(H): SIP revisions.
- Section 110(a)(2)(J): Consultation with government officials, public notification, and prevention of significant deterioration (PSD) and visibility protection.
- Section 110(a)(2)(K): Air quality modeling and submission of modeling data.

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

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

B. Regulatory History

On July 18, 1997, EPA issued a revised NAAQS for ozone¹ and a new NAAQS for fine particulate matter (PM_{2.5}).² EPA subsequently

¹ The 8-hour averaging period replaced the previous 1-hour averaging period, and the level of the NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38856).

² The annual PM_{2.5} standard was set at 15 micrograms per cubic meter (µg/m³),

revised the 24-hour PM_{2.5} NAAQS on September 21, 2006.³ Each of these actions triggered a requirement for states to submit an infrastructure SIP to address the applicable requirements of section 110(a)(2) within three years of issuance of the new or revised NAAQS.

On March 10, 2005, EPA entered into a Consent Decree with Earthjustice that obligated EPA to make official findings in accordance with section 110(k)(1) of the CAA as to whether states had made required complete SIP submissions, pursuant to sections 110(a)(1) and (2), by December 15, 2007 for the 1997 8-hour ozone NAAQS and by October 5, 2008 for the 1997 PM_{2.5} NAAQS. EPA made such findings for the 1997 8-hour ozone NAAQS on March 27, 2008 (73 FR 16205) and on October 22, 2008 (73 FR 62902) for the 1997 PM_{2.5} NAAQS. In each case, EPA found that Hawaii had failed to make a complete submittal to satisfy the requirements of section 110(a)(2) for the relevant pollutant. On September 8, 2011, EPA made a similar finding of failure to submit for Hawaii in relation to the 2006 24-hour PM_{2.5} NAAQS (76 FR 55577).⁴

based on the 3-year average of annual arithmetic mean PM_{2.5} concentrations from single or multiple community-oriented monitors and the 24-hour PM_{2.5} standard was set at 65 µg/m³, based on the 3-year average of the 98th percentile of 24-hour PM_{2.5} concentrations at each population-oriented monitor within an area (62 FR 38652).

³ The final rule revising the 24-hour NAAQS for PM_{2.5} from 65 µg/m³ to 35 µg/m³ was published in the Federal Register on October 17, 2006 (71 FR 61144).

⁴ In the September 2011 notice, EPA specifically found that Hawaii failed to submit for section 110(a)(2)(A)-(C), (D)(i)(II) (PSD prong only), (E)-(H) and (J)-(M). EPA had already determined on June 10, 2011 that Hawaii had failed to submit a complete SIP to address the attainment and maintenance

C. Scope of the Infrastructure SIP Evaluation

EPA is currently acting upon SIPs that address the infrastructure requirements of CAA section 110(a)(1) and (2) for ozone and PM_{2.5} NAAQS for various states across the country. Commenters on EPA's recent proposals for some states raised concerns about EPA statements that it was not addressing certain substantive issues in the context of acting on those infrastructure SIP submissions.⁵ Those commenters specifically raised concerns involving provisions in existing SIPs and with EPA's statements in other proposals that it would address two issues separately and not as part of actions on the infrastructure SIP submissions: (i) existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources, that may be contrary to the CAA and EPA's policies addressing such excess emissions ("SSM"); and (ii) existing provisions related to "director's variance" or "director's discretion" that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA ("director's discretion"). EPA notes that there are two other substantive issues for which EPA likewise stated in other

requirements of section 110(a)(2)(D)(i)(I) (75 FR 32673).

⁵ See, Comments of Midwest Environmental Defense Center, dated May 31, 2011. Docket # EPA-R05-OAR-2007-1179 (adverse comments on proposals for three states in Region 5).

proposals that it would address the issues separately: (i) existing provisions for minor source new source review programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs ("minor source NSR"); and (ii) existing provisions for Prevention of Significant Deterioration programs that may be inconsistent with current requirements of EPA's "Final NSR Improvement Rule," 67 FR 80,186 (December 31, 2002), as amended by 72 FR 32,526 (June 13, 2007) ("NSR Reform"). In light of the comments, EPA believes that its statements in various proposed actions on infrastructure SIPs with respect to these four individual issues should be explained in greater depth. It should be noted, however, that, unlike other states, Hawaii has submitted revisions to its minor NSR program as part of its Infrastructure SIP submittal. EPA is taking action on these revisions in a separate notice-and-comment rulemaking. Thus, the discussion below pertaining to "existing provisions" is not relevant to Hawaii's revised minor NSR rules.

EPA intended the statements in other proposals concerning these four issues merely to be informational, and to provide general notice of the potential existence of provisions within the existing SIPs of some states that might require future corrective action. EPA did not want states, regulated entities, or members of the public to be under the misconception that the

Agency's approval of the infrastructure SIP submission of a given state should be interpreted as a reapproval of certain types of provisions that might exist buried in the larger existing SIP for such state. Thus, for example, EPA explicitly noted that the Agency believes that some states may have existing SIP-approved SSM provisions that are contrary to the CAA and EPA policy, but that "in this rulemaking, EPA is not proposing to approve or disapprove any existing State provisions with regard to excess emissions during SSM of operations at facilities." EPA further explained, for informational purposes, that "EPA plans to address such State regulations in the future." EPA made similar statements, for similar reasons, with respect to the director's discretion, minor source NSR, and NSR Reform issues. EPA's objective was to make clear that approval of an infrastructure SIP for these NAAQS should not be construed as explicit or implicit reapproval of any existing provisions that relate to these four substantive issues.

Unfortunately, the commenters and others evidently interpreted these statements to mean that EPA considered action upon the SSM provisions and the other three substantive issues to be integral parts of acting on an infrastructure SIP submission, and therefore that EPA was merely postponing taking final action on the issues in the context of the infrastructure SIPs. This was not EPA's intention. To the contrary, EPA only

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

Although section 110(a)(1) addresses the timing and general requirements for these infrastructure SIPs, and section 110(a)(2) provides more details concerning the required contents of these infrastructure SIPs, EPA believes that many of the specific statutory provisions are facially ambiguous. In particular, the list of required elements provided in section

110(a)(2) contains a wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive provisions, and some of which pertain to requirements for both authority and substantive provisions.⁶ Some of the elements of section 110(a)(2) are relatively straightforward, but others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS.⁷

Notwithstanding that section 110(a)(2) provides that "each" SIP submission must meet the list of requirements therein, EPA has long noted that this literal reading of the statute is internally inconsistent, insofar as section 110(a)(2)(I) pertains to nonattainment SIP requirements that could not be met on the schedule provided for these SIP submissions in section

⁶ For example, section 110(a)(2)(E) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a substantive program to address certain sources as required by part C of the CAA; section 110(a)(2)(G) provides that states must have both legal authority to address emergencies and substantive contingency plans in the event of such an emergency.

⁷ For example, section 110(a)(2)(D)(i) requires EPA to be sure that each state's SIP contains adequate provisions to prevent significant contribution to nonattainment of the NAAQS in other states. This provision contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution. See, e.g., "Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call; Final Rule," 70 FR 25,162 (May 12, 2005) (defining, among other things, the phrase "contribute significantly to nonattainment").

110(a)(1).⁸ This illustrates that EPA must determine which provisions of section 110(a)(2) may be applicable for a given infrastructure SIP submission. Likewise, EPA has previously decided that it could take action on different parts of the larger, general "infrastructure SIP" for a given NAAQS without concurrent action on all subsections.⁹ Finally, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS and the attendant infrastructure SIP submission for that NAAQS. For example, the monitoring requirements that might be necessary for purposes of section 110(a)(2)(B) for one NAAQS could be very different than what might be necessary for a different pollutant. Thus, the content of an infrastructure SIP submission to meet this element from a state might be very different for an entirely new NAAQS, versus a minor revision to an existing NAAQS.¹⁰

⁸ See, e.g., *Id.*, 70 FR 25,162, at 63 - 65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

⁹ For example, EPA issued separate guidance to states with respect to SIP submissions to meet section 110(a)(2)(D)(i) for the 1997 8-hour ozone and 1997 PM_{2.5} NAAQS. See, "Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and PM_{2.5} National Ambient Air Quality Standards," from William T. Harnett, Director Air Quality Policy Division OAQPS, to Regional Air Division Director, Regions I-X, dated August 15, 2006. In addition, EPA bifurcated the action on these "interstate transport" provisions within section 110(a)(2) and in most instances, substantive administrative actions occurred on different tracks with different schedules.

¹⁰ For example, implementation of the 1997 PM_{2.5} NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

Similarly, EPA notes that other types of SIP submissions required under the statute also must meet the requirements of section 110(a)(2), and this also demonstrates the need to identify the applicable elements for other SIP submissions. For example, nonattainment SIPs required by part D likewise have to meet the relevant subsections of section 110(a)(2) such as section 110(a)(2)(A) or (E). By contrast, it is clear that nonattainment SIPs would not need to meet the portion of section 110(a)(2)(C) that pertains to part C, i.e., the PSD requirements applicable in attainment areas. Nonattainment SIPs required by part D also would not need to address the requirements of section 110(a)(2)(G) with respect to emergency episodes, as such requirements would not be limited to nonattainment areas. As this example illustrates, each type of SIP submission may implicate some subsections of section 110(a)(2) and not others.

Given the potential for ambiguity of the statutory language of section 110(a)(1) and (2), EPA believes that it is appropriate for EPA to interpret that language in the context of acting on the infrastructure SIPs for a given NAAQS. Because of the inherent ambiguity of the list of requirements in section 110(a)(2), EPA has adopted an approach in which it reviews infrastructure SIPs against this list of elements "as applicable." In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of

the purpose of the submission or the NAAQS in question, would meet each of the requirements, or meet each of them in the same way. EPA elected to use guidance to make recommendations for infrastructure SIPs for these ozone and PM_{2.5} NAAQS.

On October 2, 2007, EPA issued guidance making recommendations for the infrastructure SIP submissions for both the 1997 8-hour ozone NAAQS and the 1997 PM_{2.5} NAAQS.¹¹ Within this guidance document, EPA described the duty of states to make these submissions to meet what the Agency characterized as the "infrastructure" elements for SIPs, which it further described as the "basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards."¹² As further identification of these basic structural SIP requirements, "attachment A" to the guidance document included a short description of the various elements of section 110(a)(2) and additional information about the types of issues that EPA considered germane in the context of such infrastructure SIPs. EPA emphasized that the description of the basic requirements listed on attachment A was not intended "to constitute an interpretation of" the requirements, and was

¹¹ See, "Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-hour Ozone and PM_{2.5} National Ambient Air Quality Standards," from William T. Harnett, Director Air Quality Policy Division, to Air Division Directors, Regions I - X, dated October 2, 2007 (the "2007 Guidance").

¹² Id. at page 2.

merely a "brief description of the required elements."¹³ EPA also stated its belief that with one exception, these requirements were "relatively self explanatory, and past experience with SIPs for other NAAQS should enable States to meet these requirements with assistance from EPA Regions."¹⁴ For the one exception to that general assumption, however, i.e., how states should proceed with respect to the requirements of section 110(a)(2)(G) for the 1997 PM_{2.5} NAAQS, EPA gave much more specific recommendations. But for other infrastructure SIP submittals, and for certain elements of the submittals for the 1997 PM_{2.5} NAAQS, EPA assumed that each State would work with its corresponding EPA regional office to refine the scope of a State's submittal based on an assessment of how the requirements of section 110(a)(2) should reasonably apply to the basic structure of the State's SIP for the NAAQS in question.

On September 25, 2009, EPA issued guidance to make recommendations to states with respect to the infrastructure SIPs for the 2006 PM_{2.5} NAAQS.¹⁵ In the 2009 Guidance, EPA

¹³ Id. at attachment A, page 1.

¹⁴ Id. at page 4. In retrospect, the concerns raised by commenters with respect to EPA's approach to some substantive issues indicate that the statute is not so "self explanatory," and indeed is sufficiently ambiguous that EPA needs to interpret it in order to explain why these substantive issues do not need to be addressed in the context of infrastructure SIPs and may be addressed at other times and by other means.

¹⁵ See, "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle (PM_{2.5}) National Ambient Air Quality Standards (NAAQS)," from William T, Harnett, Director Air Quality Policy

addressed a number of additional issues that were not germane to the infrastructure SIPs for the 1997 8-hour ozone and 1997 PM_{2.5} NAAQS, but were germane to these SIP submissions for the 2006 PM_{2.5} NAAQS. Significantly, neither the 2007 Guidance nor the 2009 Guidance explicitly referred to the SSM, director's discretion, minor source NSR, or NSR Reform issues as among specific substantive issues EPA expected states to address in the context of the infrastructure SIPs, nor did EPA give any more specific recommendations with respect to how states might address such issues even if they elected to do so. The SSM and director's discretion issues implicate section 110(a)(2)(A), and the minor source NSR and NSR Reform issues implicate section 110(a)(2)(C). In the 2007 Guidance and the 2009 Guidance, however, EPA did not indicate to states that it intended to interpret these provisions as requiring a substantive submission to address these specific issues in existing SIP provisions in the context of the infrastructure SIPs for these NAAQS. Instead, EPA's 2007 Guidance merely indicated its belief that the states should make submissions in which they established that they have the basic SIP structure necessary to implement, maintain, and enforce the NAAQS. EPA believes that states can establish that

Division, to Regional Air Division Directors, Regions I - X, dated September 25, 2009 (the "2009 Guidance").

they have the basic SIP structure, notwithstanding that there may be potential deficiencies within the existing SIP.

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

this NAAQS and an anticipated absence of relevant provisions in existing SIPs.

Finally, EPA believes that its approach is a reasonable reading of section 110(a)(1) and (2) because the statute provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow the Agency to take appropriate tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a "SIP call" whenever the Agency determines that a state's SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or otherwise to comply with the CAA.¹⁶ Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.¹⁷ Significantly, EPA's determination that an action on the infrastructure SIP is not the appropriate time and place to address all potential existing SIP problems does not preclude

¹⁶ EPA has recently issued a SIP call to rectify a specific SIP deficiency related to the SSM issue. See, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 76 FR 21,639 (April 18, 2011).

¹⁷ EPA has recently utilized this authority to correct errors in past actions on SIP submissions related to PSD programs. See, "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule," 75 FR 82,536 (December 30, 2010). EPA has previously used its authority under CAA 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. See, e.g., 61 FR 38,664 (July 25, 1996) and 62 FR 34,641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67,062 (November 16, 2004) (corrections to California SIP); and 74 FR 57,051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

the Agency's subsequent reliance on provisions in section 110(a)(2) as part of the basis for action at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director's discretion provisions in the course of acting on the infrastructure SIP, EPA believes that section 110(a)(2)(A) may be among the statutory bases that the Agency cites in the course of addressing the issue in a subsequent action.¹⁸

D. Proposed Interpretation of CAA Section 128

As noted above, EPA is currently acting upon infrastructure SIPs for various states across the country. Among the elements that EPA is evaluating as part of these actions is the requirement of CAA section 110(a)(2)(E)(ii) that SIPs, "provide . . . requirements that the State comply with the requirements respecting State boards under section 128" of the CAA. In contrast with, for example, the SSM issue discussed above, section 110(a)(2)(E)(ii) unambiguously mandates that each SIP must satisfy the requirements of section 128. Accordingly, as part of our infrastructure SIP actions, EPA is reviewing SIPs in relation to the requirements of CAA section 128. In this action,

¹⁸ EPA has recently disapproved a SIP submission from Colorado on the grounds that it would have included a director's discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, e.g., 75 FR 42,342 at 42,344 (July 21, 2010) (proposed disapproval of director's discretion provisions); 76 FR 4,540 (January 26, 2011) (final disapproval of such provisions).

EPA finds it appropriate to propose certain interpretations of section 128 and invite comment on these interpretations.¹⁹

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

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

(1) any board or body which approves permits or enforcement orders under [this Act] shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under [this Act], and

(2) any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed.

In 1978, we issued a guidance memorandum recommending ways States could meet the requirements of section 128, including suggested interpretations of certain terms in section 128.²⁰

We first note that, in the conference report, the committee stated: "It is the responsibility of each State to determine the specific requirements to meet the general requirements of [section 128]."²¹ We think that this legislative history indicates that Congress intended states to have some latitude in

¹⁹ If EPA finalizes this action, the proposed interpretations will supersede (to the extent that they are inconsistent with) interpretations suggested in the 1978 guidance, at least for Hawaii's SIP.

²⁰ Memorandum from David O. Bickart, Deputy General Counsel, to Regional Air Directors, Guidance to States for Meeting Conflict of Interest Requirements of Section 128 (Mar. 2, 1978).

²¹ H.R. Rep. 95-564 (1977), reprinted in 3 Legislative History of the Clean Air Act Amendments of 1977 526-27 (1978).

the specifics of implementing section 128, so long as the implementation is consistent with the plain text of the section. We also note that Congress explicitly provided in section 128 that States could adopt more stringent requirements. As a result, we propose four important considerations for implementing section 128.

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

Second, subsection 128(a)(1) applies only to states that have a board or body that is composed of multiple individuals and that, among its duties, approves permits or enforcement orders under the CAA. It does not apply in states that have no such multi-member board or body, and where instead a single head of an agency approves permits or enforcement orders under the CAA. This flows from the text of section 128 itself, for two reasons. First, as section 128(a)(1) refers to a majority of members in the plural, we think it reasonable to read section

128(a)(1) as not creating any requirements for an individual with sole authority for approving a permit or enforcement order under the CAA. Second, subsection 128(a)(2) explicitly applies to the head of an executive agency with "similar powers" to a board or body that approves permits or enforcement orders under the CAA, while subsection 128(a)(1) omits any reference to heads of executive agencies.²² We infer that subsection 128(a)(1) should not apply to heads of executive agencies who approve permits or enforcement orders.

Third, subsection 128(a)(2) applies to all states, regardless of whether the state has a multi-member board or body that approves permits or enforcement orders under the CAA. Although the title of section 128 is "State boards," the language of section 128(a)(2) explicitly applies where the head of an executive agency, rather than a board or body, approves permits or enforcement orders. In instances where the head of an executive agency delegates his or her power to approve permits

²² For the same two reasons, we distinguish the language of section 128(a)(1) from the language of the analogous provision in the Clean Water Act (CWA), governing composition of a state board or body that approves National Pollutant Discharge Elimination System (NPDES) permit applications. In relevant part, the CWA provision states, "no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit." CWA section 304(i)(D), 33 U.S.C. 1314(i)(D). The CWA provision does not refer to a majority of members in the plural, and the CWA provision does not have a separate section explicitly including heads of executive agencies. Thus, the bases for our interpretation of subsection 128(a)(1) do not exist in the CWA.

or enforcement orders, or where statutory authority to approve permits or enforcement orders is nominally vested in another state official, the requirement to disclose adequately potential conflicts of interest still applies. In other words, EPA thinks that SIPs for all states, regardless of whether a state board or body approves permits or enforcement orders under the CAA, must contain adequate provisions for disclosure of potential conflicts of interest. We note that many states have general disclosure provisions, applicable to all state employees, that may be adequate, if submitted for adoption into the SIP, to satisfy the requirements of subsection 128(a)(2).

Finally, a state may satisfy the requirements of section 128 by submitting for adoption into the SIP a provision of state law that closely tracks or mirrors the language of the applicable provisions of section 128. A state may do so in two ways. First, the state may adopt the language of subsections 128(a)(1) and 128(a)(2) verbatim. Under this approach, the state will be able to meet the continuing requirements of section 128 without any additional, future SIP revisions, even if the state adds or removes authority, either at the state level or local level, to individuals or to boards or bodies to approve permits or enforcement orders under the CAA. Second, the state may modify the language of subsections 128(a)(1) (if applicable) and 128(a)(2) to name the particular board, body, or individual

official with approval authority. In this case, if the state subsequently modifies that authority, the state may have to submit a corresponding SIP revision to meet the continuing requirements of section 128. While either approach would meet the minimum requirements of section 128, we note that the statute explicitly permits states to adopt more stringent requirements, for example through providing more detailed definitions of the terms in subsections 128(a)(1) and 128(a)(2), such as those suggested in the 1978 guidance memorandum. This approach gives states flexibility in implementing section 128, while still ensuring consistency with the statute.

II. The State's Submittal and Related Actions by EPA

On December 14, 2011, the Hawaii Department of Health (HDOH) submitted revisions to the Hawaii SIP to address the infrastructure requirements of CAA section 110(a)(2) ("2011 Hawaii Infrastructure SIP"). This submittal included (1) provisions of the Hawaii Administrative Rules (HAR) to be included in the Hawaii SIP as regulatory materials; (2) provisions of the Hawaii Revised Statutes (HRS) to be included in the SIP as non-regulatory materials; and (3) an "Infrastructure SIP Certification of Adequacy." The Certification sets forth HDOH's analysis of how the Hawaii SIP, with the submitted revisions, would satisfy the infrastructure

SIP requirements of CAA section 110(a)(2) with respect to the 1997 ozone NAAQS and the 1997 and 2006 PM_{2.5} NAAQS (collectively "the relevant NAAQS").²³ The 2011 Hawaii Infrastructure SIP also included supporting materials for each of the components of the SIP revision.

On February 1, 2012, EPA's Region 9 Regional Administrator signed a proposed rule and a direct final rule to approve into the Hawaii SIP a number of the regulatory provisions that were included in the 2011 Hawaii Infrastructure SIP. On March 20, 2012, the Regional Administrator signed a proposed rule and a direct final rule to approve into the SIP the remaining regulatory provisions submitted for inclusion in the SIP. These latter rules update and replace the minor NSR rules in the existing Hawaii SIP. Pre-publication versions of these rules and the accompanying TSDs have been placed in the docket for this action.

III. EPA's Evaluation and Proposed Action

EPA has evaluated the 2011 Hawaii Infrastructure SIP and the existing provisions of the Hawaii SIP in relation to the infrastructure SIP requirements for the relevant NAAQS. The Technical Support Document (TSD) for this action, which is

²³ A copy of the complete 2011 Hawaii Infrastructure SIP submittal has been placed in the docket for this action and is available online at <http://www.regulations.gov>, docket number EPA-R09-OAR-2012-0228.

available online at <http://www.regulations.gov>, docket number EPA-R09-OAR-2012-0228, includes a summary of our evaluation for each element.

Based upon this analysis, EPA proposes to approve the 2011 Hawaii Infrastructure SIP with respect to the following requirements:

- Section 110(a)(2)(A): Emission limits and other control measures.
- Section 110(a)(2)(B): Ambient air quality monitoring/data system.
- Section 110(a)(2)(C) (in part): Program for enforcement of control measures and regulation of new stationary sources (minor NSR program only).
- Section 110(a)(2)(D)(i)(I): Interstate transport (significant contribution and interference with maintenance).
- Section 110(a)(2)(E): Adequate resources and authority, conflict of interest, and oversight of local governments and regional agencies.
- Section 110(a)(2)(F): Stationary source monitoring and reporting.
- Section 110(a)(2)(G): Emergency episodes.
- Section 110(a)(2)(H): SIP revisions.

- Section 110(a)(2)(J) (in part): Public notification.
- Section 110(a)(2)(K): Air quality modeling and submission of modeling data.
- Section 110(a)(2)(L): Permitting fees.
- Section 110(a)(2)(M): Consultation/participation by affected local entities.

In addition, we are proposing to approve into the SIP as non-regulatory materials the statutory provisions that HDOH included as part of the 2011 Hawaii Infrastructure SIP.²⁴

We are proposing to disapprove the 2011 Hawaii Infrastructure SIP with respect to the following infrastructure SIP requirements:

- Section 110(a)(2)(C) (in part): Program for enforcement of control measures and regulation of new stationary sources (permit program as required in part C of title I of the Act).
- Section 110(a)(2)(D)(i)(II): Interstate transport - prevention of significant deterioration and visibility protection.

²⁴ A list of these statutory provisions and their complete text are found in Attachment 1 and Appendix A of the 2011 Hawaii Infrastructure SIP, respectively. These documents have been placed in the docket for this action and are available online at <http://www.regulations.gov>, docket number EPA-R09-OAR-2012-0228.

- Section 110(a)(2)(D)(ii): Interstate pollution abatement and international air pollution.
- Section 110(a)(2)(J) (in part): Consultation with government officials and PSD.

As explained in the TSD, our proposed disapproval of these elements and sub-elements is compelled by the absence of an approvable SIP revision from Hawaii that meets the PSD requirements of sections 160 through 165 of the CAA.²⁵ In addition, our proposed disapproval of Section 110(a)(2)(D)(i)(II) is compelled by the lack of approvable SIP revisions to address reasonably attributable visibility impairment (RAVI) and regional haze affecting mandatory Class I areas.²⁶ Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of part D, title I of the CAA (CAA sections 171-193) or is required in response to a finding of substantial inadequacy as described in CAA section 110(k)(5) (SIP Call) starts a sanctions clock. The 2011 Hawaii Infrastructure SIP was not submitted to meet either of these requirements. Therefore, any action we take to finalize the described disapproval will not trigger sanctions.

²⁵ See 40 CFR 52.632.

²⁶ See 40 CFR 52.633 (reasonably attributable visibility impairment) and 74 FR 2392 (Jan. 15, 2009) (regional haze).

In addition, these deficiencies have previously been addressed through promulgation of a PSD FIP (43 FR 26410, June 19, 1978, as amended at 45 FR 52741, Aug. 7, 1980; 68 FR 11322, Mar. 10, 2003; 68 FR 74488, Dec. 24, 2003) and a FIP addressing RAVI (50 FR 28553, July 12, 1985, as amended at 52 FR 45137, Nov. 24, 1987). The requirement to address regional haze will be addressed through final action on a regional haze SIP and/or FIP for Hawaii, which must be signed by September 15, 2012, under the terms of a proposed consent decree.²⁷ Therefore, this disapproval, if finalized, would not trigger any new FIP obligations.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations (42 U.S.C. 7410(k), 40 CFR 52.02(a)). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves some state law as meeting Federal requirements and disapproves other state law because it does not meet Federal requirements; this proposed action does not impose additional requirements beyond

²⁷ We have placed a copy of the proposed consent decree in the docket for this action.

those imposed by state law. For that reason, this proposed action:

- Is not a ``significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999); is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995

(15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and,

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Oxides of nitrogen, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 27, 2012

Keith Takata,
Acting Regional Administrator,
Region IX.

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