6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R07-OAR-2013-0233; FRL-9803-1]

Approval and Promulgation of Implementation Plans; State of Kansas; Infrastructure SIP Requirements for the 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing action on four Kansas State Implementation Plan (SIP) submissions. First, EPA is proposing to approve portions of two SIP submissions from the State of Kansas addressing the applicable requirements of Clean Air Act (CAA) for the 1997 and 2006 National Ambient Air Quality Standards (NAAQS) for fine particulate matter ($PM_{2.5}$). The CAA requires that each state adopt and submit a SIP to support implementation, maintenance, and enforcement of each new or revised NAAQS promulgated by EPA. These SIPs are commonly referred to as "infrastructure" SIPs. The infrastructure requirements are designed to ensure that the structural components of each state's air quality management program are adequate to meet the state's responsibilities under the CAA. EPA is also proposing to approve two additional SIP submissions from

Kansas, one addressing the Prevention of Significant Deterioration (PSD) program in Kansas, and another addressing the requirements applicable to any board or body which approves permits or enforcement orders of the CAA, both of which support requirements associated with infrastructure SIPs.

DATES: 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 No. EPA-R07-OAR-2013-0233, by one of the following methods:

1. http://www.regulations.gov. Follow the on-line instructions for submitting comments.

2. *Email*: kemp.lachala@epa.gov.

3. *Mail*: Ms. Lachala Kemp, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, Air and Waste Management Division, 11201 Renner Boulevard, Lenexa, KS 66219.

4. *Hand Delivery or Courier*: Deliver your comments to Ms. Lachala Kemp, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, Air and Waste Management Division, 11201 Renner Boulevard, Lenexa, KS 66219.

Instructions: Direct your comments to Docket ID No. EPA-R07-OAR-2013-0233. EPA's policy is that all comments received 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 information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through http://www.regulations.gov or e-mail information that you consider to be CBI or otherwise protected. The http://www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through http://www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. 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. Electronic files should avoid the use of special characters, any form of encryption, and should be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the http://www.regulations.gov index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute.

Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at http://www.regulations.gov or in hard copy at the U.S. Environmental Protection Agency, Region 7, 11201 Renner Boulevard, Lenexa, KS 66219 from 8:00 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

FOR FURTHER INFORMATION CONTACT: Ms. Lachala Kemp, Air Planning and Development Branch U.S. Environmental Protection Agency, Region 7, 11201 Renner Boulevard, Lenexa, KS 66219; *telephone number:* (913) 551-7214; *fax number:* (913) 551-7065; *email address:* kemp.lachala@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we refer to EPA. This section provides additional information by addressing the following questions:

I. What is Being Addressed in this Document?

II. What is a Section 110(a)(1) and (2) Infrastructure SIP?

III. What Elements are Applicable Under Sections 110(a)(1) and (2)?

IV. What is the Scope of this Rulemaking as it Relates to Infrastructure SIPs?

I. What is Being Addressed in this Document?

In today's proposed rulemaking, EPA is proposing action on four Kansas SIP submissions. EPA received the first submission on January 8, 2008, addressing the infrastructure SIP requirements relating to the 1997 $PM_{2.5}$ NAAQS. EPA received the second submission on April 12, 2010, addressing the infrastructure SIP requirements relating to the 2006 $PM_{2.5}$ NAAQS In a previous action EPA approved section 110(a)(2)(D)(i)(I) and (II) - Interstate and international transport requirements of Kansas' January 8, 2008, SIP submittal for the 1997 $PM_{2.5}$ NAAQS (72 FR 10608, May 8, 2007); and EPA disapproved section 110(a)(2)(D)(i)(I)- Interstate and international transport requirements of Kansas' April 12, 2010, SIP submittal for the 2006 $PM_{2.5}$ NAAQS (76 FR 43143, July 20, 2011). Therefore, in today's action, we are not proposing to act on these portions of

section 110(a)(2)since they have already been acted upon by EPA. If EPA takes final action as proposed, we will have acted on both the January 8, 2008, and the April 12, 2010, submissions in their entirety excluding those provisions that are not within the scope of today's rulemaking as identified in section IV for both the 1997 and 2006 $PM_{2.5}$ infrastructure SIP submissions.

The third submission was received by EPA on March 1, 2013. This submission revises the Kansas rule found at Kansas Administrative Regulations (KAR) 29-19-350 "Prevention of Significant Deterioration of Air Quality" to incorporate by reference Federal rule changes through July 1, 2011. These changes implement elements of the Prevention of Significant Deterioration (PSD) regulations relating to EPA's 2008 NSR $PM_{2.5}$ Implementation Rule (73 FR 28321, May 16, 2008) and certain elements of the "Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$) – Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)" rule (75 FR 64864, October 20, 2010). In addition, this rule amendment defers the application of PSD permitting requirements to carbon dioxide (CO_2) emissions from bioenergy and other biogenic stationary sources.

The fourth submission was received by EPA on March 19, 2013. This submittal addresses the conflict of interest

provisions in section 128 of the CAA as it relates to infrastructure SIPs described in element E below.[1]

II. What is a Section 110(a)(1) and (2) Infrastructure SIP?

Section 110(a)(1) of the CAA requires, in part, that states make a SIP submission to EPA to implement, maintain and enforce each of the NAAQS promulgated by EPA after reasonable notice and public hearings. Section 110(a)(2) includes a list of specific elements that such infrastructure SIP submissions must address. SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised NAAQS. These SIP submissions are commonly referred to as "infrastructure" SIPs.

III. What Elements are Applicable Under Sections 110(a)(1) and (2)?

On October 2, 2007, EPA issued guidance to address infrastructure SIP elements required under sections 110(a)(1) and (2) for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS.[2] On September 25, 2009, EPA issued guidance to address infrastructure SIP elements required under sections 110(a)(1) and (2) for the 2006

[1] On March 19, 2013, Kansas submitted its provisions with regards to CAA section 128 as part of its infrastructure SIP submission for the 2008 Ozone and 2010 Nitrogen Dioxide(NO_2) NAAQS. EPA believes that these conflict of interest provisions are applicable to all NAAQS. Therefore, as part of today's rulemaking for the 1997 and 2006 $PM_{2.5}$ NAAQS, we are proposing to approve these provisions into the Kansas SIP. See section V for further information.

[2] William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards, "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards," Memorandum to EPA Air Division Directors, Regions I-X, October 2, 2007 (2007 Memo).

24-hour $PM_{2.5}$ NAAQS.[3] EPA will address these elements below under the following headings: (A) Emission limits and other control measures; (B) Ambient air quality monitoring/data system; (C) Program for enforcement of control measures (PSD, New Source Review for nonattainment areas, and construction and modification of all stationary sources); (D) Interstate and international transport[4]; (E) Adequate authority, resources, implementation, and oversight; (F) Stationary source monitoring system; (G) Emergency authority; (H) Future SIP revisions; (I) Nonattainment areas; (J) Consultation with government officials, public notification, prevention of significant deterioration (PSD), and visibility protection; (K) Air quality and modeling/data; (L) Permitting fees; and (M) Consultation/participation by affected local entities.

IV. What is the Scope of this Rulemaking as it Relates to Infrastructure SIPs?

The applicable infrastructure SIP requirements are contained in sections 110(a)(1) and (2) of the CAA. EPA is proposing action on each of the requirements of section

[3] William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards, "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)," Memorandum to EPA Regional Air Division Directors, Regions I-X, September 25, 2009 (2009 Memo).

[4] Section 110(a)(2)(D)(i) includes four requirements referred to as prongs 1 through 4. Prongs 1 and 2 are provided at section 110(a)(2)(D)(i)(I); Prongs 3 and 4 are provided at section 110(a)(2)(D)(i)(II).

110(a)(2)(A) through section 110(a)(2)(M), as applicable, except for the elements detailed in the following paragraphs.

This rulemaking will not cover four substantive issues that are not integral to acting on a state's infrastructure SIP submission: (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"); (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"); (iii) existing provisions for minor source New Source Review (NSR) programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs ("minor source NSR"); and, (iv) existing provisions for PSD programs that may be inconsistent with current requirements of EPA's "Final NSR Improvement Rule" (67 FR 80186, December 31, 2002), as amended by the "NSR Reform" final rulemaking on June 13, 2007 (72 FR 32526). Instead, EPA has indicated that it has other authority to address any such existing SIP defects in other rulemakings, as appropriate. A detailed rationale for why these four substantive issues are not part of the scope of infrastructure SIP rulemakings can be found at 76 FR 41075,

41076-41079 (July 13, 2011). *See also* 77 FR 38239, 38240-38243 (June 27, 2012); and 77 FR 46361, 46362-46365 (August 3, 2012).

In addition to the four substantive areas above, EPA is not acting in this action on section 110(a)(2)(I) – Nonattainment Area Plan or Plan Revisions Under Part D and on the visibility protection portion of section 110(a)(2)(J). A detailed rationale for not acting on elements of these requirements is discussed within each applicable section of this rulemaking. As described above in section I, EPA is also not acting on portions of section 110(a)(2)(D)(i) - Interstate and international transport, as final actions have already been taken on portions of this element for both the Kansas 1997 and 2006 $PM_{2.5}$ infrastructure SIP submissions.

Finally, as part of this action, EPA is evaluating the state's compliance with the new PSD requirements promulgated in the "Implementation of New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)," (73 FR 28321, May 16, 2008), and the $PM_{2.5}$ Increment, SILs and SMC Rule, (75 FR 64864, October 20, 2010). Regarding the May 16, 2008 rule, on January 4, 2013, the U.S. Court of Appeals in the District of Columbia, in *Natural Resources Defense Council v. EPA*, 706 F.3d 428 (D.C. Cir.), issued a judgment that remanded two of EPA's rules implementing the 1997 $PM_{2.5}$ NAAQS, including the 2008 rule. The Court ordered the EPA to "repromulgate these

rules pursuant to Subpart 4 consistent with this opinion." *Id.* at 437. Subpart 4 of Part D, Title 1 of the CAA establishes additional provisions for particulate matter nonattainment areas. The 2008 implementation rule addressed by the Court's decision promulgated NSR requirements for implementation of $PM_{2.5}$ in both nonattainment areas (nonattainment NSR) and attainment/unclassifiable areas (PSD). As the requirements of Subpart 4 only pertain to nonattainment areas, EPA does not consider the portions of the 2008 rule that address requirements for $PM_{2.5}$ attainment and unclassifiable areas to be affected by the Court's opinion. Moreover, the EPA does not anticipate the need to revise any PSD requirements promulgated in the 2008 rule in order to comply with the Court's decision. Accordingly, EPA's approval of Kansas' infrastructure SIP as to Elements (C), (D)(i)(II), and (J), with respect to the PSD requirements promulgated by the 2008 implementation rule does not conflict with the Court's opinion.

The Court's decision with respect to the nonattainment NSR requirements promulgated by the 2008 implementation rule also does not affect EPA's action on the present infrastructure SIP submission. As described above, EPA interprets the Act to exclude nonattainment area requirements, including requirements associated with a nonattainment NSR program, from infrastructure SIP submissions due 3 years after adoption or revision of a

NAAQS. Instead, these elements are typically referred to as nonattainment SIP or attainment plan elements, which states must submit by the dates statutorily prescribed under part D within subparts 2 through 5, extending as far as ten years following designations for some elements. Given these separate applicable SIP submission dates, EPA concludes that these specific requirements are outside the scope of the infrastructure SIPs.

V. What is EPA's Evaluation of How the State Addressed the Relevant Elements of Sections 110(a)(1) and (2)?

On July 18, 1997, EPA promulgated new $PM_{2.5}$ primary and secondary NAAQS (62 FR 38652). On October 17, 2006, EPA made further revisions to the primary and secondary NAAQS for $PM_{2.5}$ (71 FR 61144). On January 8, 2008, EPA Region 7 received Kansas' particulate matter infrastructure SIP submission for the 1997 $PM_{2.5}$ standard. On April 12, 2010, EPA Region 7 received Kansas' particulate matter infrastructure SIP submittal for the 2006 $PM_{2.5}$ standard. These SIP submissions became complete as a matter of law on July 8, 2008, and October 12, 2010, respectively. EPA has reviewed both of the State's infrastructure SIP submissions and the relevant statutory and regulatory authorities and provisions referenced in those submittals or referenced in Kansas' SIP.

(A) Emission limits and other control measures: Section 110(a)(2)(A) requires SIPs to include enforceable emission

limits and other control measures, means or techniques, schedules for compliance and other related matters as needed to implement, maintain and enforce each NAAQS.[5]

The state of Kansas' statutes and regulations authorize the Kansas Department of Health and Environment (KDHE) to regulate air quality and implement air quality control regulations. KDHE's statutory authority can be found in Chapter 65, Article 30 of the Kansas Statutes Annotated (KSA), otherwise known as the Kansas Air Quality Act. KSA Section 65-3003 places the responsibility for air quality conservation and control of air pollution with the Secretary of Health and Environment ("Secretary"). The Secretary in turn administers the Kansas Air Quality Act through the Division of Environment within KDHE. Air pollution is defined in KSA Section 65-3002(c) as the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as is, or tends significantly to be, injurious to human health or welfare, animal or plant life, or property, or would unreasonably interfere with the enjoyment of life or property, or would contribute to the formation of regional haze.

[5] The specific nonattainment area plan requirements of section 110(a)(2)(I), are subject to the timing requirements of section 172, not the timing requirement of section 110(a)(1). Thus, section 110(a)(2)(A) does not require that states submit regulations or emissions limits specifically for attaining the 1997 or 2006 $PM_{2.5}$ NAAQS. Those SIP provisions are due as part of each state's attainment plan, and will be addressed separately from the requirements of section 110(a)(2)(A). In the context of an infrastructure SIP, EPA is not evaluating the existing SIP provisions for this purpose. Instead, EPA is only evaluating whether the state's SIP has basic structural provisions for the implementation of the NAAQS.

KSA Section 65-3005(a)(1) provides authority to the Secretary to adopt, amend and repeal rules and regulations implementing the Kansas Air Quality Act. It also gives the Secretary the authority to establish ambient air quality standards for the state of Kansas as a whole or for any part thereof. KSA Section 65-3005(a)(12). The Secretary has the authority to promulgate rules and regulations to ensure that Kansas is in compliance with the provisions of the Act, in furtherance of a policy to implement laws and regulations consistent with those of the Federal government. KSA Section 65-3005(b). The Secretary also has the authority to establish emission control requirements as appropriate to facilitate the accomplishment of the purposes of the Kansas Air Quality Act. KSA Section 65-3010(a).

Based upon review of the state's infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in those submissions or referenced in Kansas' SIP, EPA believes that Kansas has statutory and regulatory authority to establish additional emissions limitations and other measures, as necessary to address attainment and maintenance of the $PM_{2.5}$ standards. Therefore, EPA believes that the Kansas SIP adequately addresses the requirements of section 110(a)(2)(A)

for the 1997 and 2006 $PM_{2.5}$ NAAQS[6] and is proposing to approve the January 8, 2008, submission regarding the 1997 $PM_{2.5}$ infrastructure SIP requirements and the April 12, 2010, submission regarding the 2006 $PM_{2.5}$ infrastructure SIP requirements for this element.

(B) Ambient air quality monitoring/data system: Section 110(a)(2)(B) requires SIPs to include provisions to provide for establishment and operation of ambient air quality monitors, collection and analysis of ambient air quality data, and making these data available to EPA upon request.

To address this element, KSA Section 65-3007 provides the enabling authority necessary for Kansas to fulfill the requirements of section 110(a)(2)(B). This provision gives the Secretary the authority to classify air contaminant sources which, in his or her judgment, may cause or contribute to air pollution. Furthermore, the Secretary has the authority to require such air contaminant sources to monitor emissions, operating parameters, ambient impacts of any source emissions, and any other parameters deemed necessary. The Secretary can also require these sources to keep records and make reports consistent with the Kansas Air Quality Act. KSA Section 65-3007(b).

[6] For the reasons stated earlier, EPA is not addressing SSM and director's discretion provisions in this rulemaking.

Kansas has an air quality monitoring network operated by KDHE and local air quality agencies that collects air quality data that are compiled, analyzed, and reported to EPA. KDHE's web site contains up-to-date information about air quality monitoring, including a description of the network and information about the monitoring of $PM_{2.5}$. *See, generally*, http://www.kdheks.gov/bar/air-monitor/indexMon.html. KDHE also conducts five-year monitoring network assessments, including the $PM_{2.5}$ monitoring network, as required by 40 CFR 58.10(d). On January 10, 2013, EPA approved Kansas' 2012 ambient air monitoring network. This plan includes, among other things, the locations for the $PM_{2.5}$ monitoring network in Kansas, which currently includes 13 monitors located at 11 sites. Data gathered by these monitors is submitted to EPA's Air Quality System, which in turn determines if the network site monitors are in compliance with the NAAQS.

Within KDHE, the Bureau of Air and Radiation implements these requirements. Along with its other duties, the Monitoring and Planning Section collects air monitoring data, quality assures the results, and reports the data. The data are then used to develop the appropriate regulatory or outreach strategies to reduce air pollution.

Based upon review of the state's infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS, and relevant

statutory and regulatory authorities and provisions referenced in those submissions or referenced in Kansas' SIP, EPA believes that the Kansas SIP meets the requirements of section 110(a)(2)(B) for the 1997 and 2006 24-hour $PM_{2.5}$ NAAQS and is proposing to approve the January 8, 2008, submission regarding the 1997 $PM_{2.5}$ infrastructure SIP requirements and the April 12, 2010, submission regarding the 2006 $PM_{2.5}$ infrastructure SIP requirements for this element.

(C) Program for enforcement of control measures (PSD, New Source *Review for nonattainment areas, and construction and modification of all stationary sources*)*:* Section 110(a)(2)(C) requires states to include the following three elements in the SIP: (1) a program providing for enforcement of all SIP measures described in section 110(a)(2)(A); (2) a program for the regulation of the modification and construction of stationary sources as necessary to protect the applicable NAAQS (i.e., state-wide permitting of minor sources); and (3) a permit program to meet the major source permitting requirements of the CAA (for areas designated as attainment or unclassifiable for the NAAQS in question).[7]

(1) *Enforcement of SIP Measures.* With respect to enforcement of requirements of the SIP, KSA Section 65-

[7] As discussed in further detail below, this infrastructure SIP rulemaking will not address the Kansas program for nonattainment area related provisions, since EPA considers evaluation of these provisions to be outside the scope of infrastructure SIP actions.

3005(a)(3) gives the Secretary the authority to issue orders, permits and approvals as may be necessary to effectuate the purposes of the Kansas Air Quality Act and enforce the Act by all appropriate administrative and judicial proceedings. Pursuant to KSA Section 65-3006, the Secretary also has the authority to enforce rules, regulations and standards to implement the Kansas Air Quality Act and to employ the professional, technical and other staff to effectuate the provisions of the Act. In addition, if the Secretary or the director of the Division of Environment finds that any person has violated any provision of any approval, permit or compliance plan or any provision of the Kansas Air Quality Act or any rule or regulation promulgated thereunder, he or she may issue an order directing the person to take such action as necessary to correct the violation. KSA Section 65-3011.

KSA Section 65-3018 gives the Secretary or the director of the Division of Environment the authority to impose a monetary penalty against any person who, among other things, either violates any order or permit issued under the Kansas Air Quality Act, or violates any provision of the Act or rule or regulation promulgated thereunder. Section 65-3028 provides for criminal penalties for knowing violations.

(2) *Minor New Source Review*. Section 110(a)(2)(C) also requires that the SIP include measures to regulate construction

and modification of stationary sources to protect the NAAQS. With respect to smaller sources that meet the criteria listed in KAR 28-19-300(b) "Construction Permits and Approvals," Kansas has a SIP-approved permitting program. Any person proposing to conduct a construction or modification at such a source must obtain approval from KDHE prior to commencing construction or modification. If KDHE determines that air contaminant emissions from a source will interfere with attainment or maintenance of the NAAQS, it cannot issue an approval to construct or modify that source (KAR 28-19-301(d)"Construction Permits and Approvals; Application and Issuance").

In this action, EPA is proposing to approve Kansas' infrastructure SIP for the 1997 and 2006 $PM_{2.5}$ standards with respect to the general requirement in section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. In this action, EPA is not proposing to approve or disapprove the state's existing minor NSR program to the extent that it is inconsistent with EPA's regulations governing this program. EPA has maintained that the CAA does not require that new infrastructure SIP submissions correct any defects in existing EPA-approved provisions of minor NSR programs in order for EPA to approve the infrastructure SIP for element (C) (*e.g.*, 76 FR 41076-41079). EPA believes that a

number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

(3) *Prevention of Significant Deterioration (PSD) permit program*. Kansas also has a program approved by EPA as meeting the requirements of Part C, relating to prevention of significant deterioration of air quality. In order to demonstrate that Kansas has met this sub-element, this PSD program must cover requirements for not just $PM_{2.5}$, but for all other regulated NSR pollutants as well. To implement the PSD permitting component of section 110(a)(2)(C) for the 1997 and 2006 $PM_{2.5}$ NAAQS, states were required to submit the necessary SIP revisions to EPA by May 16, 2011, and July 20, 2012, pursuant to EPA's NSR $PM_{2.5}$ Implementation Rule (2008 NSR Rule), (73 FR 28321, May 16, 2008), and EPA's $PM_{2.5}$ Increment—Significant

Impact Levels (SILs)—Significant Monitoring Concentration (SMC) rule, (75 FR 64864, October 20, 2010). As described in section IV above, the January 4, 2013, court decision remanding the 2008 rule does not impact the EPA's action as to this element.

The 2008 NSR Rule finalized several new requirements for SIPs to address sources that emit direct $PM_{2.5}$ and other pollutants that contribute to secondary $PM_{2.5}$ formation. One of these requirements is for NSR permits to address pollutants responsible for the secondary formation of $PM_{2.5,}$ otherwise known as precursors. In the 2008 NSR Rule, EPA identified precursors to $PM_{2.5}$ for the PSD program to include sulfur dioxide (SO_2) and nitrogen oxide (NO_x) (unless the state demonstrates to the Administrator's satisfaction or EPA demonstrates that NO_x emissions in an area are not a significant contributor to that area's ambient $PM_{2.5}$ concentrations) (*see* 73 FR 28325). The 2008 NSR Rule also specifies that volatile organic compounds (VOCs) are not considered to be precursors to $PM_{2.5}$ in the PSD program unless the state demonstrates to the Administrator's satisfaction or EPA demonstrates that emissions of VOCs in an area are significant contributors to that area's ambient $PM_{2.5}$ concentrations. The specific references to $SO_{2,}$ NO_x, and VOCs as they pertain to secondary $PM_{2.5}$ formation are codified at 40 CFR 51.166(b)(49)(i)(b) and 40 CFR 52.21(b)(50)(i)(b). The deadline for states to submit SIP revisions to their PSD programs

incorporating these new requirements was May 16, 2011 (73 FR 28341).

As part of identifying pollutants that are precursors to $PM_{2.5}$, the 2008 NSR Rule also revised the definition of "significant" as it relates to a net emissions increase or the potential of a source to emit pollutants. Specifically, 40 CFR 51.166(b)(23)(i) and 40 CFR 52.21(b)(23)(i) define "significant" for $PM_{2.5}$ to mean the following emissions rates: 10 tons per year (tpy) of direct $PM_{2.5}$; 40 tpy of SO_2; and 40 tpy of NOx (unless the state demonstrates to the Administrator's satisfaction or EPA demonstrates that NO_x emissions in an area are not a significant contributor to that area's ambient $PM_{2.5}$ concentrations).

Another provision of the 2008 NSR Rule requires states to account for gases that could condense to form particulate matter, known as condensables, for applicability determinations and in establishing emission limits for $PM_{2.5}$ and PM_{10}[8] in NSR permits. EPA provided that states were required to account for $PM_{2.5}$ and PM_{10} condensables beginning on or after January 1, 2011. This requirement is currently codified in 40 CFR 51.166(b)(49)(i)(a) and 40 CFR 52.21(b)(50)(i)(a). Revisions to states' PSD programs incorporating the inclusion of condensables

[8] PM_{10} refers to particles with diameters between 2.5 and 10 microns, oftentimes referred to as "coarse" particles.

were required to be submitted to EPA by May 16, 2011 (73 FR at 28341).

The definition of "regulated NSR pollutant" in the PSD provisions of the 2008 rule inadvertently required states to also account for the condensable PM fraction with respect to one indicator of PM referred to as "particular matter emissions." The term "particulate matter emissions" includes $PM_{2.5}$ and PM_{10} particles as well as larger particles, and is an indicator for PM that has long been used for measuring PM under various New Source Performance Standards (NSPS) (40 CFR part 60).[9] A similar provision addressing condensables was added to the Nonattainment NSR SIP provisions of the 2008 NSR Rule but does not include a requirement to account for "particulate matter (PM) emissions" in all cases (40 CFR 51.165(a)(1)(xxxvii)(D)). On October 12, 2012, EPA finalized a rulemaking to amend the definition of "regulated NSR pollutant" promulgated in the NSR $PM_{2.5}$ Rule regarding the PM condensable provision currently at 40 CFR 51.166(b)(49)(i)(a), 52.21(b)(50)(i)(a), and the EPA's Emissions Offset Interpretative Ruling (see 77 FR 65107). The rulemaking removes the inadvertent requirement in the 2008 NSR Rule that the measurement of condensables be generally included as part of

[9] In addition to the NSPS for PM, it is noted that states regulated "particulate matter emissions" for many years in their SIPs for PM, and the same indicator has been used as a surrogate for determining compliance with certain standards contained in 40 CFR part 63, regarding National Emission Standards for Hazardous Air Pollutants.

the measurement and regulation of "particulate matter emissions."[10]

The 2010 $PM_{2.5}$ Increment-Significant Impact Levels (SILS)-Significant Monitoring Concentration (SMC) Rule provided additional regulatory requirements under the PSD SIP program regarding the implementation of the $PM_{2.5}$ NAAQS (*see* 75 FR 64864). As a result, the $PM_{2.5}$ PSD Increment—SILs—SMC Rule required states to submit SIP revisions to adopt the required PSD increments by July 20, 2012. Specifically, the rule required a state's submitted PSD SIP revision to adopt and submit for EPA approval the $PM_{2.5}$ increments pursuant to section 166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS.

That rule also permitted states, at their discretion, to choose to adopt and submit for EPA approval into the SIP SILs, used as a screening tool (by a major source subject to PSD), to evaluate the impact a proposed major source or modification may have on the NAAQS or PSD increment; and a SMC (also a screening tool), used by a major source subject to PSD to determine the subsequent level of data gathering required for a PSD permit application for emissions of $PM_{2.5}$. More detail on the $PM_{2.5}$ PSD

[10] The change finalized in that action does not mean that EPA has entirely exempted the inclusion of the condensable PM fraction as part of accounting for "particulate matter emissions." It may be necessary for PSD sources to count the condensable PM fraction with regard to "particulate matter emissions" where either the applicable NSPS compliance test includes the condensable PM fraction or the applicable implementation plan requires the condensable PM fraction to be counted. See 77 FR 65112.

Increment—SILs—SMC Rule can be found at 75 FR 64864. In regards to the SILs and SMC provisions of the 2010 $PM_{2.5}$ rule, on January 22, 2013, the U.S. Court of Appeals for the District of Columbia, in *Sierra Club v. EPA*, No. 10-1413 (filed Dec. 17. 2010), issued a judgment that, *inter alia*, vacated and remanded the provisions concerning implementation of the $PM_{2.5}$ SILs and vacated the provisions adding the $PM_{2.5}$ SMC that were promulgated as part of the 2010 $PM_{2.5}$ PSD Rule.

Accordingly, the only remaining requirements from the 2010 rule are the $PM_{2.5}$ increment and associated provisions discussed below. Under section 165(a)(3) of the CAA, a PSD permit applicant must demonstrate that emissions from the proposed construction and operation of a facility "will not cause, or contribute to, air pollution in excess of any maximum allowable increase or allowable concentration for any pollutant." In other words, when a source applies for a PSD SIP permit to emit a regulated pollutant in an attainment or unclassifiable area, the permitting authority implementing the PSD SIP must determine if emissions of the regulated pollutant from the source will cause significant deterioration in air quality. Significant deterioration occurs when the amount of the new pollution exceeds the applicable PSD increment, which is the "maximum allowable increase" of an air pollutant allowed to occur above

the applicable baseline concentration[11] for that pollutant. PSD increments prevent air quality in attainment and unclassifiable areas from deteriorating up to or beyond the level set by the NAAQS. Therefore, an increment is the mechanism used to estimate "significant deterioration" of air quality for a pollutant in an area.

For PSD baseline purposes, a baseline area for a particular pollutant emitted from a source includes the attainment or unclassifiable/attainment area in which the source is located, as well as any other attainment or unclassifiable/attainment area in which the source's emissions of that pollutant are projected (by air quality modeling) to result in an ambient pollutant increase of at least 1 ug/m^3 (annual average) (40 CFR 51.166(b)(15)(i) and (ii)). Under EPA's existing regulations, the establishment of a baseline area for any PSD increment results from the submission of the first complete PSD permit application after a trigger date (which for $PM_{2.5}$ is defined as October 20, 2011, by regulation) and is based on the location of the proposed source and its emissions impact on the area. Once the baseline area is established, subsequent PSD sources locating in that area must consider that a portion of the available increment may have already been consumed by previous

[11] Section 169(4) of the CAA provides that the baseline concentration of a pollutant for a particular baseline area is generally the same air quality at the time of the first application for a PSD permit in the area.

emissions increases. In general, the submittal date of the first complete PSD permit application in a particular area is the operative "baseline date."[12] On or before the date of the first complete PSD application, emissions generally are considered to be part of the baseline concentration, except for certain emissions from major stationary sources. Most emissions increases that occur after the baseline date will be counted toward the amount of increment consumed. Similarly, emissions decreases after the baseline date restore or expand the amount of increment that is available (*see* 75 FR 64864). As described in the $PM_{2.5}$ PSD Increment—SILs—SMC Rule, pursuant to the authority under section 166(a) of the CAA, EPA promulgated numerical increments for $PM_{2.5}$ as a new pollutant[13] for which the NAAQS were established after August 7, 1977,[14] and derived 24-hour and annual $PM_{2.5}$ increments for the three area classifications (Class I, II and III) using the "contingent safe harbor" approach (75 FR at 64869 and table at 40 CFR 51.166(c)(1)).

---

[12] Baseline dates are pollutant specific. That is, a complete PSD application establishes the baseline date only for those regulated NSR pollutants that are projected to be emitted in significant amounts (as defined in the regulations) by the applicant's new source or modification. Thus, an area may have different baseline dates for different pollutants.

[13] EPA generally characterized the $PM_{2.5}$ NAAQS as a NAAQS for a new indicator of PM. EPA did not replace the PM_{10} NAAQs with the NAAQS for $PM_{2.5}$ when the $PM_{2.5}$ NAAQS were promulgated in 1997. Rather, EPA retained the annual and 24-hour NAAQS for PM_{10} as if $PM_{2.5}$ was a new pollutant even though EPA had already developed air quality criteria for PM generally (75 FR 64864).

[14] EPA interprets 166(a) to authorize EPA to promulgate pollutant-specific PSD regulations meeting the requirements of section 166(c) and 166(d) for any pollutant for which EPA promulgates a NAAQS after 1977.

In addition to PSD increments for the 2006 $PM_{2.5}$ NAAQS, the $PM_{2.5}$ PSD Increment—SILs—SMC Rule amended the definition at 40 CFR 51.166 and 40 CFR 52.21 for "major source baseline date" and "minor source baseline date" to establish the $PM_{2.5}$ NAAQS specific dates (including trigger dates) associated with the implementation of $PM_{2.5}$ PSD increments. See the PSD Increment-SILs-SMC rule for a more detailed discussion on the amendments to these definitions (75 FR 64864). In accordance with section 166(b) of the CAA, EPA required the states to submit revised implementation plans adopting the $PM_{2.5}$ PSD increments to EPA for approval within 21 months from promulgation of the final rule (i.e., by July 20, 2012). Each state was responsible for determining how increment consumption and the setting of the minor source baseline date for $PM_{2.5}$ would occur under its own PSD program. Regardless of when a state begins to require $PM_{2.5}$ increment analysis and how it chooses to set the $PM_{2.5}$ minor source baseline date, the emissions from sources subject to PSD for $PM_{2.5}$ for which construction commenced after October 20, 2010, (major source baseline date) consume the $PM_{2.5}$ increment and therefore should be included in the increment analyses occurring after the minor source baseline date is established for an area under the state's revised PSD SIP program.

To meet the requirements of element (C), in addition to the $PM_{2.5}$ PSD elements that must be incorporated in to the SIP, each

state's PSD program must meet applicable requirements for all regulated pollutants in PSD permits. For example, if a state lacks provisions needed to address NO_x as a precursor to ozone, the provisions of section 110(a)(2)(C) requiring a suitable PSD permitting program for $PM_{2.5}$ will not be considered to be met.

Relating to ozone, the EPA's "Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard – Phase 2; Final Rule to Implement Certain Aspects of the 1990 Amendments Relating to New Source Review and Prevention of Significant Deterioration as They Apply in Carbon Monoxide, Particulate Matter, and Ozone NAAQS; Final Rule for Reformulated Gasoline" (Phase 2 Rule), was published on November 8, 2005 (70 FR 71612). Among other requirements, the Phase 2 Rule obligated states to revise their PSD programs to explicitly identify NO_x as a precursor to ozone (70 FR at 71679, and at 71699-71700). This requirement is currently codified in 40 CFR 51.166(b)(49)(i)(b).

EPA notes that the Kansas SIP provides that ozone precursors (volatile organic compounds (VOCs) and nitrogen oxides) are regulated. The regulations at 40 CFR 52.21(b)(50) specifically state that nitrogen oxides and VOCs are considered precursors for ozone in all attainment and unclassifiable areas. For example, a stationary source that is major for VOCs is also major for ozone for purposes of permitting in nonattainment areas (KAR 28-19-16a(r) "New Source Permit Requirements for

Designated Nonattainment Areas"). In addition, a source that undergoes a significant net emissions increase for VOCs is also considered to have undergone a significant net emissions increase for ozone for the purposes of the Kansas air quality regulations (KAR 28-19-200(eee)(6)"General Provisions; Definitions"). The ozone provisions were previously approved by EPA into the Kansas SIP on February 22, 2011 (76 FR 9658).

As a part of today's rulemaking, EPA is proposing to approve amendments to Kansas' PSD regulations for $PM_{2.5}$ into the SIP. See section VI for EPA's analysis of how Kansas' March 1, 2013, submission meets the PSD requirements.

Regarding greenhouse gases (GHG), on June 3, 2010, EPA issued a final rule establishing a "common sense" approach to addressing GHG emissions from stationary sources under the CAA permitting programs. The "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," or "Tailoring Rule," set thresholds for GHG emissions that define when permits under the NSR PSD and title V operating permit programs are required for new and existing industrial facilities (*see* 75 FR 31514). Without the new threshold provided by the Tailoring Rule, sources with GHG emissions above the statutory thresholds (of 100 or 250 tons per year) would be subject to PSD, which could have potentially resulted in apartment

complexes, strip malls, small farms, restaurants, etc. triggering GHG PSD requirements.

With respect to the applicability of the Kansas PSD program to GHG emissions, on February 22, 2011, EPA approved in to the Kansas SIP an amendment that would regulate GHGs under Kansas' PSD program (76 FR 9658). Thus, we have previously determined that the Kansas SIP meets the PSD requirements with respect to GHGs.

Based upon review of the State's infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS and the March 1, 2013, submission regarding PSD requirements, and relevant statutory and regulatory authorities and provisions referenced in those submissions or referenced in Kansas' SIP, with respect to the requirements of section 110(a)(2)(C) for the 1997 and 2006 24-hour $PM_{2.5}$ NAAQS, EPA is proposing to approve the January 8, 2008, submission regarding the 1997 $PM_{2.5}$ infrastructure SIP requirements, the April 12, 2010, submission regarding the 2006 $PM_{2.5}$ infrastructure SIP requirements, and the March 1, 2013, submission regarding the PSD requirements. EPA's analysis of the March 1, 2013, submittal is provided in section VI below.

(D) Interstate and international transport:

Section 110(a)(2)(D)(i)(I) requires SIPs to include adequate provisions prohibiting any source or other type of emissions activity in one state from contributing significantly

to nonattainment, or interfering with maintenance, of any NAAQS in another state. Furthermore, section 110(a)(2)(D)(i)(II) requires SIPs to include adequate provisions prohibiting any source or other type of emissions activity in one state from interfering with measures required of any other state to prevent significant deterioration of air quality or to protect visibility. Section 110(a)(2)(D)(i) includes four requirements referred to as prongs 1 through 4. Prongs 1 and 2 are provided at section 110(a)(2)(D)(i)(I); Prongs 3 and 4 are provided at section 110(a)(2)(D)(i)(II).

In this notice, we are not proposing to take any actions related to the interstate transport requirements of section 110(a)(2)(D)(i)(I) – prongs 1 and 2. At this time, there is no SIP submission from Kansas relating to 110(a)(2)(D)(i)(I) for the 1997 or 2006 $PM_{2.5}$ NAAQS pending before the Agency. EPA previously approved the provisions of the Kansas SIP submission addressing the requirements of section 110(a)(2)(D)(i)(I), with respect to the 1997 $PM_{2.5}$ standards, into the Kansas SIP on May 8, 2007 (72 FR 10608). EPA also disapproved the portion of the Kansas SIP submission intended to address section 110(a)(2)(D)(i)(I) with respect to the 2006 $PM_{2.5}$ standards (76 FR 43143, July 20, 2011).

With respect to the PSD requirements of section 110(a)(2)(D)(i)(II)– prong 3, EPA notes that Kansas'

satisfaction of the applicable infrastructure SIP PSD requirements for the 1997 and 2006 $PM_{2.5}$ NAAQS has been detailed in the section addressing section 110(a)(2)(C). EPA also notes that the proposed action in that section related to PSD is consistent with the proposed approval related to PSD for section 110(a)(2)(D)(i)(II). Therefore, EPA is proposing to approve the PSD requirements of section 110(a)(2)(D)(i)(II)– prong 3.

With regard to the applicable requirements for visibility protection of section 110(a)(2)(D)(i)(II)- prong 4, states are subject to visibility and regional haze program requirements under part C of the CAA (which includes sections 169A and 169B). The 2009 Memo[15] states that these requirements can be satisfied by an approved SIP addressing reasonably attributable visibility impairment, if required, and an approved SIP addressing regional haze.

EPA's final approval of Kansas' regional haze plan "Approval and Promulgation of Implementation Plans; State of Kansas: Regional Haze" was published on December 27, 2011 (76 FR 80754). In this final approval, EPA determined that the Kansas SIP met requirements of the CAA, for states to prevent any future and existing anthropogenic impairment of visibility in Class I areas caused by emissions of air pollutants located over

[15] William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards "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)." Memorandum to EPA Regional Air Division Directors, Regions I-X, September 25, 2009.

a wide geographic area. Therefore, EPA proposes that Kansas has met the infrastructure SIP requirements of section 110(a)(2)(D)(i)(II) related to visibility protection for the 1997 and 2006 $PM_{2.5}$ NAAQS.

Section 110(a)(2)(D)(ii) also requires that the SIP insure compliance with the applicable requirements of sections 126 and 115 of the CAA, relating to interstate and international pollution abatement, respectively.

Section 126(a) of the Act requires new or modified sources to notify neighboring states of potential impacts from sources within the state. The Kansas regulations address abatement of the effects of interstate pollution. For example, KAR 28-19-350(k)(2) "Prevention of Significant Deterioration (PSD) of Air Quality" requires KDHE, prior to issuing any construction permit for a proposed new major source or major modification, to notify EPA, as well as: any state or local air pollution control agency having jurisdiction in the air quality control region in which the new or modified installation will be located; the chief executives of the city and county where the source will be located; any comprehensive regional land use planning agency having jurisdiction where the source will be located; and any state, Federal land manager, or Indian governing body whose lands will be affected by emissions from the new source or

modification.[16] *See also* KAR 28-19-204 "General Provisions; Permit Issuance and Modification; Public Participation" for additional public participation requirements. In addition, no Kansas source or sources have been identified by EPA as having any interstate impacts under section 126 in any pending actions relating to any air pollutant.

Section 115 of the CAA authorizes EPA to require a state to revise its SIP under certain conditions to alleviate international transport into another country. There are no final findings under section 115 of the CAA against Kansas with respect to any air pollutant. Thus, the State's SIP does not need to include any provisions to meet the requirements of section 115.

Based upon review of the State's infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in those submissions or referenced in Kansas' SIP, EPA believes that Kansas has the adequate infrastructure needed to address section 110(a)(2)(D)(i)(II) – Prongs 3 and 4 and 110(a)(2)(D)(ii) for the 1997 and 2006 $PM_{2.5}$ NAAQS. EPA is proposing to approve the January 8, 2008, submission regarding the 1997 $PM_{2.5}$ infrastructure SIP requirements and the April 12,

[16] KAR 28-19-16k(b) provides similar requirements for construction permits issued in nonattainment areas.

2010, submission regarding the 2006 $PM_{2.5}$ infrastructure SIP requirements for this element.

(E) Adequate authority, resources, implementation, and oversight: Section 110(a)(2)(E) requires that SIPs provide for the following: (1) necessary assurances that the state (and other entities within the state responsible for implementing the SIP) will have adequate personnel, funding, and authority under State or local law to implement the SIP, and that there are no legal impediments to such implementation; (2) requirements that the state comply with the requirements relating to state boards, pursuant to section 128 of the CAA; and (3) necessary assurances that the state has responsibility for ensuring adequate implementation of any plan provision for which it relies on local governments or other entities to carry out that portion of the plan.

(1) Section 110(a)(2)(E)(i) requires states to establish that they have adequate personnel, funding, and authority. With respect to adequate authority, we have previously discussed Kansas' statutory and regulatory authority to implement the 1997 and 2006 $PM_{2.5}$ NAAQS, primarily in the discussion of section 110(a)(2)(A) above. Neither Kansas nor EPA have identified any legal impediments in the State's SIP to implementation of these NAAQS.

With respect to adequate resources, KDHE asserts that it has adequate personnel to implement the SIP. The Kansas statutes provide the Secretary the authority to employ technical, professional and other staff to effectuate the purposes of the Kansas Air Quality Act from funds appropriated and available for these purposes. *See* KSA Section 65-3006(b). Within KDHE, the Bureau of Air and Radiation implements the Kansas Air Quality Act. This Bureau is further divided into the Air Compliance & Enforcement Section, Air Permit Section; the Monitoring & Planning Section; and the Radiation and Asbestos Control Section.

With respect to funding, the Kansas Legislature annually approves funding and personnel resources for KDHE to implement the air program. The annual budget process provides a periodic update that enables KDHE and the local agencies to adjust funding and personnel needs. In addition, the Kansas statutes grant the Secretary authority to establish various fees for sources, to cover any and all parts of administering the provisions of the Kansas Air Quality Act. For example, KSA Section 65-3008(f) grants the Secretary authority to fix, charge, and collect fees for construction approvals and permits (and the renewals thereof). KSA Section 65-3024 grants the Secretary the authority to establish annual emissions fees. These emission fees, along with any moneys recovered by the

state under the provisions of the Kansas Air Quality Act, are deposited into an air quality fee fund in the state treasury. Moneys in the air quality fee fund can only be used for the purpose of administering the Kansas Air Quality Act.

Kansas also uses funds in the non-Title V subaccounts, along with General Revenue funds and EPA grants under, for example, sections 103 and 105 of the Act, to fund the programs. EPA conducts periodic program reviews to ensure that the state has adequate resources and funding to, among other things, implement the SIP.

(2) Conflict of interest provisions – Section 128

Section 110(a)(2)(E)(ii) also requires that each state SIP meet the requirements of section 128, relating to representation on state boards and conflicts of interest by members of such boards. Section 128(a)(1) requires that any board or body which approves permits or enforcement orders under the CAA must 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 and enforcement orders under the CAA. Section 128(a)(2) requires that members of such a board or body or the head of an agency with similar powers, adequately disclose any potential conflicts of interest. In 1978, EPA issued a guidance memorandum recommending ways that states could meet the requirements of section 128, including suggested

interpretations of certain terms in section 128.[17] EPA has not issued further guidance or regulations of general applicability on the subject since that time. However, EPA has recently proposed certain interpretations of section 128 as part of its actions on other infrastructure SIPs consistent with the statutory requirements (*see, e.g.,* (77 FR 44555, July 30, 2012) and (77 FR 66398, November 5, 2012)). We are now proposing these same interpretations in relation to the Kansas SIP.

On March 19, 2013, Kansas submitted to EPA specific provisions of the Kansas statutes that address section 128, for inclusion into the SIP. In today's action, we are also proposing to approve Kansas' March 19, 2013, submission related to sections 110(a)(2)(E)(ii) and 128 of the CAA. Due to the fact that this proposed rule revision is not yet state-effective, Kansas requested that EPA "parallel process" the revision. Under this procedure, the EPA Regional Office works closely with the state while developing new or revised regulations. Generally, the state submits a copy of the proposed regulation or other revisions to EPA before conducting its public hearing. EPA reviews this proposed state action and prepares a notice of proposed rulemaking. EPA publishes this notice of proposed rulemaking in the **Federal Register** and solicits public comment

[17] *See* Memorandum from David O. Bickart to Regional Air Directors, "Guidance to States for Meeting Conflict of Interest Requirements of Section 128," Suggested Definitions, March 2, 1978.

in approximately the same time frame during which the state is holding its public hearing. The state and EPA thus provide for public comment periods on both the state and the Federal actions in parallel. After Kansas submits the formal state-effective rule and SIP revision request (including a response to all public comments raised during the state's public participation process), EPA will prepare a final rulemaking notice for the SIP revision. If changes are made to the state's proposed rule after EPA's notice of proposed rulemaking, such changes must be acknowledged in EPA's final rulemaking action. If the changes are significant, then EPA may be obliged to re-propose the action. In addition, if the changes render the SIP revision not approvable, EPA's re-proposal of the action would be a disapproval of the revision. EPA and Kansas have worked to assure that the state's SIP correctly addresses these requirements.

EPA's analysis consisted of review of Kansas' March 19, 2013, SIP submission and EPA's additional review of Kansas' statutes and authorities. The first step in the analysis consists of identifying boards, bodies and persons responsible for approving permits and enforcement orders and determining the applicability of the section 128 requirements to these entities. The Kansas Air Quality Act does not establish any boards or bodies that are responsible for approving permits or enforcement

orders; rather, that authorities lies exclusively with the Secretary (see KSA Section 65-3005(a)(3)). Therefore, EPA believes the requirements of section 128(a)(1) do not apply to Kansas.

To satisfy section 128(a)(2) of the CAA, Kansas submitted to EPA KSA Section 46-247(c) for inclusion into the SIP on March 19, 2013. This provision requires state officers (as defined at KSA Section 46-221), employees and members of boards, councils and commissions under the jurisdiction of the head of any state agency to file written statements of substantial interests (as that term is defined at KSA Section 46-229). Thus, Kansas law requires disclosure of any potential conflicts of interest by the head of an agency responsible for issuing permits and enforcement orders (*i.e.*, KDHE).

EPA believes that the above identified relevant sections of the Kansas statutes directly address the provisions related to section 128(a)(2) of the CAA. We propose to approve the following provisions into the Kansas SIP as they strengthen the SIP with respect to the conflict of interest requirements of CAA section 128:

- KSA Section 46-221
- KSA Section 46-229
- KSA Section 46-247(c)

(3) With respect to assurances that the state has responsibility to implement the SIP adequately when it authorizes local or other agencies to carry out portions of the plan, KSA Section 65-3005(a)(8) grants the Secretary authority to encourage local units of government to handle air pollution problems within their own jurisdictions and to provide technical and consultative assistance therefore. The Secretary may also enter into agreements with local units of government to administer all or part of the provisions of the Kansas Air Quality Act in the units' respective jurisdictions. In fact, KSA Section 65-3016 allows for cities and/or counties (or combinations thereof) to form local air quality conservation authorities. These authorities will then have the authority to enforce air quality rules and regulations adopted by the Secretary and adopt any additional rules, regulations and standards as needed to maintain satisfactory air quality within their jurisdictions.

At the same time, the Kansas statutes also retain authority in the Secretary to carry out the provisions of the state air pollution control law. KSA Section 65-3003 specifically places responsibility for air quality conservation and control of air pollution with the Secretary. The Secretary shall then administer the Kansas Air Quality Act through the Division of Environment. As an example of this retention of authority, KSA

Section 65-3016 only allows for the formation of local air quality conservation authorities with the approval of the Secretary. In addition, although these authorities can adopt additional air quality rules, regulations and standards, they may only do so if those rules, regulations and standards are in compliance with those set by the Secretary for that area. Currently, KDHE oversees the following local agencies that implement that Kansas Air Quality Act: the City of Wichita Office of Environmental Health, Johnson County Department of Health & Environment, Shawnee County Health Agency, and Unified Government of Wyandotte County – Kansas City, Kansas Public Health Department.

Based upon review of the State's infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS and the March 19, 2013, SIP submission, and relevant statutory and regulatory authorities and provisions referenced in those submissions or referenced in Kansas' SIP, EPA believes that Kansas has the adequate infrastructure needed to address section 110(a)(2)(E) for the 1997 and 2006 $PM_{2.5}$ NAAQS and is proposing to approve the January 8, 2008, submission regarding the 1997 $PM_{2.5}$ infrastructure SIP requirements and the April 12, 2010, submission regarding the 2006 $PM_{2.5}$ infrastructure SIP requirements, and the March 19, 2013, submission relating to section 128 requirements.

(F) Stationary source monitoring system: Section 110(a)(2)(F) requires states to establish a system to monitor emissions from stationary sources and to submit periodic emission reports. Each SIP shall require 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. The SIP shall also require periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and requires that the state correlate the source reports with emission limitations or standards established under the CAA. These reports must be made available for public inspection at reasonable times.

To address this element, KSA Section 65-3007 gives the Secretary the authority to classify air contaminant sources which, in his or her judgment, may cause or contribute to air pollution. The Secretary shall require air contaminant emission sources to monitor emissions, operating parameters, ambient impact of any source emissions, and any other parameters deemed necessary. Furthermore, the Secretary may require these emissions sources to keep records and make reports consistent with the purposes of the Kansas Air Quality Act.

In addition, KAR 28-19-12(A) "Measurement of Emissions" states that KDHE may require any person responsible for the

operation of an emissions source to make or have tests made to determine the rate of contaminant emissions from the source whenever it has reason to believe that existing emissions exceed limitations specified in the Kansas air quality regulations. At the same time, KDHE may also conduct its own tests of emissions from any source. KAR 28-19-12(B). The Kansas regulations also require that all Class I operating permits include requirements for monitoring of emissions (KAR 28-19-512(a)(9) "Class I Operating Permits; Permit Content").

Kansas makes all monitoring reports (as well as compliance plans and compliance certifications) submitted as part of a construction permit or Class I or Class II permit application publicly available. *See* KSA Section 65-3015(a); KAR 28-19-204(c)(6) "General Provisions; Permit Issuance and Modification; Public Participation." KDHE uses this information to track progress towards maintaining the NAAQS, developing control and maintenance strategies, identifying sources and general emission levels, and determining compliance with emission regulations and additional EPA requirements. Although the Kansas statutes allow a person to request that records or information reported to KDHE be regarded and treated as confidential on the grounds that it constitutes trade secrets, emission data is specifically excluded from this protection. *See* KSA Section 65-3015(b).

Based upon review of the State's infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in those submissions or referenced in Kansas' SIP, EPA believes that Kansas has the adequate infrastructure needed to address section 110(a)(2)(F) for the 1997 and 2006 $PM_{2.5}$ NAAQS and is proposing to approve the January 8, 2008, submission regarding the 1997 $PM_{2.5}$ infrastructure SIP requirements and the April 12, 2010, submission regarding the 2006 $PM_{2.5}$ infrastructure SIP requirements for this element.

(G) Emergency authority: Section 110(a)(2)(G) requires SIPs to provide for authority to address activities causing imminent and substantial endangerment to public health or welfare or the environment (comparable to the authorities provided in Section 303 of the CAA), and to include contingency plans to implement such authorities as necessary.

KSA Section 65-3012(a) states that whenever the Secretary receives evidence that emissions from an air pollution source or combination of sources presents an imminent and substantial endangerment to public health or welfare or to the environment, he or she may issue a temporary order directing the owner or operator, or both, to take such steps as necessary to prevent the act or eliminate the practice. Upon issuance of this

temporary order, the Secretary may then commence an action in the district court to enjoin these acts or practices.

KAR 28-19-56 "Episode Criteria" allows the Secretary to proclaim an air pollution alert, air pollution warning, or air pollution emergency whenever he or she determines that the accumulation of air contaminants at any sampling location has attained levels which could, if such levels are sustained or exceeded, threaten the public health. KAR 28-19-57 "Emission Reduction Requirements" imposes restrictions on emission sources in the event one of these three air pollution episode statuses is declared.

With respect to the contingency plan requirements of section 110(a)(2)(G), EPA has issued guidance making recommendations for how states may elect to approach this issue. In that guidance, EPA recommended that, where a state can demonstrate that $PM_{2.5}$ levels have remained below 140.4 micrograms per cubic meter, the state is not required to develop a contingency plan to satisfy element (G). EPA believes that this is a reasonable interpretation of the statute and addresses the $PM_{2.5}$ NAAQS in a way analogous to other NAAQS pollutants. $PM_{2.5}$ monitoring data from monitors across the state have shown that 24-hour $PM_{2.5}$ values have never exceeded 140.4 micrograms per cubic meter in Kansas. Therefore, Kansas is not required to develop a contingency plan for $PM_{2.5}$ at this time. That said, the

Kansas regulations provide that any person responsible for the operation of a source of air contamination adjudged to be of major concern with respect to the possible implementation of air pollution emergency episode control procedures either because of the nature or the quantity of its emissions must, at the request of KDHE, prepare an emergency episode plan to be implemented in the event that such an episode is declared. *See* KAR 28-19-58 "Emergency Episode Plans".

Based upon review of the State's infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in those submissions or referenced in Kansas' SIP, EPA believes that Kansas has the adequate infrastructure needed to address section 110(a)(2)(G) for the 1997 and 2006 $PM_{2.5}$ NAAQS and is proposing to approve the January 8, 2008, submission regarding the 1997 $PM_{2.5}$ infrastructure SIP requirements and the April 12, 2010, submission regarding the 2006 $PM_{2.5}$ infrastructure SIP requirements for this element.

(H) Future SIP revisions: Section 110(a)(2)(H) requires states to have the authority to revise their SIPs in response to changes in the NAAQS, availability of improved methods for attaining the NAAQS, or in response to an EPA finding that the SIP is substantially inadequate to attain the NAAQS.

KSA Section 65-3005(b) specifically states that it is the policy of the state of Kansas to regulate the air quality of the state and implement laws and regulations that are applied equally and uniformly throughout the state and consistent with that of the Federal government. Therefore, the Secretary has the authority to promulgate rules and regulations to ensure that Kansas is in compliance with the provisions of the Federal CAA. KSA 65-3005(b)(1).

As discussed previously, KSA Section 65-3005(a)(1) provides authority to the Secretary to adopt, amend and repeal rules and regulations implementing and consistent with the Kansas Air Quality Act. The Secretary also has the authority to establish ambient air quality standards for the state of Kansas or any part thereof. KSA Section 65-3005(a)(12). Therefore, as a whole, the Secretary has the authority to revise rules as necessary to respond to any necessary changes in the NAAQS.

Based upon review of the State's infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in those submissions or referenced in Kansas' SIP, EPA believes that Kansas has adequate infrastructure needed to address section 110(a)(2)(H) for the 1997 and 2006 $PM_{2.5}$ NAAQS and is proposing to approve the January 8, 2008, submission regarding the 1997 $PM_{2.5}$ infrastructure SIP requirements and the April 12,

2010, submission regarding the 2006 $PM_{2.5}$ infrastructure SIP requirements for this element.

(I) Nonattainment areas: Section 110(a)(2)(I) requires that in the case of a plan or plan revision for areas designated as nonattainment areas, states must meet applicable requirements of Part D of the CAA, relating to SIP requirements for designated nonattainment areas.

As noted earlier, EPA does not expect infrastructure SIP submissions to address subsection (I). The specific SIP submissions for designated nonattainment areas, as required under CAA title I, part D, are subject to a different submission schedule than those for section 110 infrastructure elements. Instead, EPA will take action on part D attainment plan SIP submissions through a separate rulemaking governed by the requirements for nonattainment areas, as described in part D.

(J) Consultation with government officials, public notification, PSD and visibility protection: Section 110(a)(2)(J) requires SIPs to meet the applicable requirements of the following CAA provisions: (1) section 121, relating to interagency consultation regarding certain CAA requirements; (2) section 127, relating to public notification of NAAQS exceedances and related issues; and (3) Part C of the CAA, relating to prevention of significant deterioration of air quality and visibility protection.

(1) With respect to interagency consultation, the SIP should provide a process for 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 SIP applies. KSA Section 65-3005(a)(14) grants the Secretary the authority to advise, consult and cooperate with other agencies of the state, local governments, other states, interstate and interlocal agencies, and the Federal government. Furthermore, as noted earlier in the discussion on section 110(a)(2)(D), Kansas' regulations require that whenever it receives a construction permit application for a new source or a modification, KDHE must notify state and local air pollution control agencies, as well as regional land use planning agencies and any state, Federal land manager, or Indian governing body whose lands will be affected by emissions from the new source or modification. *See* KAR 28-19-350(k)(2) "Prevention of Significant Deterioration (PSD) of Air Quality."

(2) With respect to the requirements for public notification in CAA section 127, the infrastructure SIP should provide citations to regulations in the SIP requiring the air agency to regularly notify the public of instances or areas in which any NAAQS are exceeded; advise the public of the health hazard associated with such exceedances; and enhance public

awareness of measures that can prevent such exceedances and of ways in which the public can participate in the regulatory and other efforts to improve air quality. As discussed previously with element (G), KAR 28-19-56 "Episode Critera" contains provisions that allow the Secretary to proclaim an air pollution alert, air pollution warning, or air pollution emergency status whenever he or she determines that the accumulation of air contaminants at any sampling location has attained levels which could, if such levels are sustained or exceeded, threaten the public health. Any of these emergency situations can also be declared by the Secretary even in the absence of issuance of a high air pollution potential advisory or equivalent advisory from a local weather bureau meteorologist, if deemed necessary to protect the public health. In the event of such an emergency situation, public notification will occur through local weather bureaus.

In addition, information regarding air pollution and related issues, is provided on a KDHE web site, http://www.kdheks.gov/bar/. This information includes air quality data, information regarding the NAAQS, health effects of poor air quality, and links to the Kansas Air Quality Monitoring Network. KDHE also has an "Outreach and Education" web page (http://www.kdheks.gov/bar/air_outreach/air_quality_edu.htm)

with information on how individuals can take measures to reduce emissions and improve air quality in daily activities.

(3) With respect to the applicable requirements of Part C of the CAA, relating to prevention of significant deterioration of air quality and visibility protection, we note in section VI of this rulemaking how the Kansas SIP meets the PSD requirements, incorporating the Federal rule by reference. With respect to the visibility component of section 110(a)(2)(J), EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the CAA. However, when EPA establishes or revises a NAAQS, these visibility and regional haze requirements under part C do not change. EPA believes that there are no new visibility protection requirements under part C as a result of a revised NAAQS. Therefore, there are no newly applicable visibility protection obligations pursuant to element J after the promulgation of a new or revised NAAQS.

Based upon review of the State's infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in those submissions or referenced in Kansas' SIP, EPA believes that Kansas has the adequate infrastructure needed to address section 110(a)(2)(J) for the 1997 and 2006 $PM_{2.5}$ NAAQS and is proposing to approve the January 8, 2008, submission regarding

the 1997 $PM_{2.5}$ infrastructure SIP requirements and the April 12, 2010, submission regarding the 2006 $PM_{2.5}$ infrastructure SIP requirements for this element.

(K) Air quality and modeling/data: Section 110(a)(2)(K) requires that SIPs provide for performing air quality modeling, as prescribed by EPA, to predict the effects on ambient air quality of any emissions of any NAAQS pollutant, and for submission of such data to EPA upon request.

Kansas has authority to conduct air quality modeling and report the results of such modeling to EPA. KSA Section 65-3005(a)(9) gives the Secretary the authority to encourage and conduct studies, investigations and research relating to air contamination and air pollution and their causes, effects, prevention, abatement and control. As an example of regulatory authority to perform modeling for purposes of determining NAAQS compliance, the regulations at KAR 28-19-350 "Prevention of Significant Deterioration (PSD) of Air Quality" incorporate EPA modeling guidance in 40 CFR Part 51, Appendix W for the purposes of demonstrating compliance or non-compliance with a NAAQS.

The Kansas statutes and regulations also give KDHE the authority to require that modeling data be submitted for analysis. KSA Section 65-3007(b) grants the Secretary the authority to require air contaminant emission sources to monitor emissions, operating parameters, ambient impact of any source

emissions or any other parameters deemed necessary. The Secretary may also require these sources to keep records and make reports consistent with the purposes of the Kansas Air Quality Act. These reports could include information as may be required by the Secretary concerning the location, size, and height of contaminant outlets, processes employed, fuels used, and the nature and time periods or duration of emissions, and such information as is relevant to air pollution and available or reasonably capable of being assembled. KSA Section 65-3007(c).

Based upon review of the State's infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in those submissions or referenced in Kansas' SIP, EPA believes that Kansas has the adequate infrastructure needed to address section 110(a)(2)(K) for the 1997 and 2006 $PM_{2.5}$ NAAQS and is proposing to approve the January 8, 2008, submission regarding the 1997 $PM_{2.5}$ infrastructure SIP requirements and the April 12, 2010, submission regarding the 2006 $PM_{2.5}$ infrastructure SIP requirements for this element.

(L) Permitting Fees: Section 110(a)(2)(L) requires SIPs to require each major stationary source to pay permitting fees to the permitting authority, as a condition of any permit required under the CAA, to cover the cost of reviewing and acting upon

any application for such a permit, and, if the permit is issued, the cost of implementing and enforcing the terms of the permit. The fee requirement applies until a fee program established by the state pursuant to Title V of the CAA, relating to operating permits, is approved by EPA.

KSA Section 65-3008(f) allows the Secretary to fix, charge, and collect fees for approvals and permits (and the renewals thereof). KSA Section 65-3024 grants the Secretary the authority to establish annual emissions fees. Fees from the construction permits and approvals are deposited into the Kansas state treasury and credited to the state general fund. Emissions fees are deposited into an air quality fee fund in the Kansas state treasury. Moneys in the air quality fee fund can only be used for the purpose of administering the Kansas Air Quality Act.

Kansas' Title V program, found at KAR 28-19-500 to 28-19-564, was approved by EPA on January 30, 1996 (61 FR 2938). EPA is reviewing the Kansas Title V program, including Title V fee structure, separately from this proposed action. Because the Title V program and associated fees legally are not part of the SIP, the infrastructure SIP action we are proposing today does not preclude EPA from taking future action regarding Kansas' Title V program.

Therefore, EPA believes that the requirements of section 110(a)(2)(L) are met and is therefore proposing to approve the

January 8, 2008, submittal regarding the 1997 $PM_{2.5}$ infrastructure SIP requirements and the April 12, 2010, submittal regarding the 2006 $PM_{2.5}$ infrastructure SIP requirements for this element.

(M) Consultation/participation by affected local entities: Section 110(a)(2)(M) requires SIPs to provide for consultation and participation by local political subdivisions affected by the SIP.

KSA Section 65-3005(a)(8)(A) gives the Secretary the authority to encourage local units of government to handle air pollution problems within their respective jurisdictions and on a cooperative basis and to provide technical and consultative assistance therefor. The Secretary may also enter into agreements with local units of government to administer all or part of the provisions on the Kansas Air Quality Act in the units' respective jurisdiction. The Secretary also has the authority to advise, consult, and cooperate with local governments. KSA Section 65-3005(a)(14). He or she may enter into contracts and agreements with local governments as is necessary to accomplish the goals of the Kansas Air Quality Act. KSA Section 65-3005(a)(16).

Currently, KDHE's Bureau of Air and Radiation has signed State and/or Local Agreements with the Department of Air Quality from the Unified Government of Wyandotte County--Kansas City, Kansas; the Wichita Office of Environmental Health; the Shawnee

County Health Department, the Johnson County Department of Health & Environment; and the Mid-America Regional Council. These agreements establish formal partnerships between the Bureau of Air and Radiation and these local agencies to work together to develop and annually update strategic goals, objectives and strategies for reducing emissions and improving air quality.

In addition, as previously noted in the discussion about section 110(a)(2)(J), Kansas' statutes and regulations require that KDHE consult with local political subdivisions for the purposes of carrying out its air pollution control responsibilities.

Based upon review of the State's infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in those submissions or referenced in Kansas' SIP, EPA believes that Kansas has the adequate infrastructure needed to address section 110(a)(2)(M) for the 1997 and 2006 $PM_{2.5}$ NAAQS and is proposing to approve the January 8, 2008, submission regarding the 1997 $PM_{2.5}$ infrastructure SIP requirements and the April 12, 2010, submission regarding the 2006 $PM_{2.5}$ infrastructure SIP requirements for this element.

VI. How Does the March 1, 2013 Kansas PSD Submission Satisfy the 2008 $PM_{2.5}$ NSR Rule and the $PM_{2.5}$ PSD Increment-SILs-SMC Rule?

To address the requirements of EPA's May 16, 2008, $PM_{2.5}$ implementation rule and the October 20, 2010, $PM_{2.5}$ PSD Increment—SILs—SMC Rule, as described above in section V in the discussion of element (C), Kansas submitted a SIP revision received by EPA on March 1, 2013, which updates its PSD rules. In this SIP submission, Kansas incorporates by reference Federal updates through July 1, 2011. The submission also updated Kansas' PSD rules to establish the allowable $PM_{2.5}$ increments, the optional screening tools (SILs), and significant monitoring concentrations (SMCs). On April 2, 2013, Kansas amended and clarified its submission so that it was no longer intending to include specific provisions relating to the SILs and SMC affected by the January 22, 2013, court decision referenced above. Our analysis of the SIP revision, with respect to both rules, follows.

Specifically, regarding the 2008 $PM_{2.5}$ Implementation Rule, the submitted SIP revision changes include incorporating by reference Federal rule changes through July 1, 2011. The submission is being updated for consistency with 40 CFR 52.21, which established the requirement for NSR permits to address directly emitted $PM_{2.5}$ and precursor pollutants and promulgated

significant emissions rates, and condensables for direct $PM_{2.5}$ and precursor pollutants (SO_2 and NO_x).

As described under element C in section V of this rulemaking, states had an obligation to address condensable PM emissions as a part of the 2008 $PM_{2.5}$ NSR implementation rule. In Kansas' March 1, 2013, SIP submission, Kansas incorporated by reference EPA's definition for regulated NSR pollutant (formerly at 40 CFR 51.166(b)(49)(vi)), including the term "particulate matter emissions," as inadvertently promulgated in the 2008 NSR Rule. EPA is, however, proposing to approve into the Kansas SIP the requirement that condensable PM be accounted for in applicability determinations and in establishing emissions limitations for $PM_{2.5}$ and PM_{10} because it is more stringent than the Federal requirement. Kansas can choose to initiate further rulemaking to ensure consistency with federal requirements.

Specifically, regarding the PSD increments, the submitted SIP revision changes include: 1) the $PM_{2.5}$ increments as promulgated at 40 CFR 51.166(c)(1) and (p)(4) (for Class I Variances) and 2) amendments to the terms "major source baseline date" (at 40 CFR 51.166(b)(14)(i)(c)) and 52.21(b)(14)(i)(c)), "minor source baseline date"(including establishment of the "trigger date") and "baseline area" (as amended at 40 CFR 51.166(b)(15)(i) and (ii) and 52.21(b)(15)(i)). In the March 1, 2013, SIP revision, Kansas incorporates by reference into the

SIP the particular definitions from 40 CFR part 51 as referenced above through July 1, 2011.

In today's action, EPA is proposing to approve Kansas' March 1, 2013, revisions to address the provisions relating to both the 2008 $PM_{2.5}$ NSR implementation and the 2010 $PM_{2.5}$ PSD Increments SILs-SMC Rules, except as identified in Kansas' April 2, 2013, letter where Kansas amended and clarified its submission so that it was no longer intending to include specific provisions relating to the SILs and SMC affected by the January 22, 2013, court decision referenced above. As noted in EPA's May 29, 2007, final action on Kansas' PSD program (72 FR 29429), provisions of the incorporated 2002 NSR reform rule relating to the Clean Unit Exemption, Pollution Control Projects,(PCPs) and exemption from the recordkeeping provisions for certain sources using the actual-to-projected-actual emissions projections test are not SIP approved because in 2005 the D.C. Circuit Court vacated portions of the rule pertaining to clean units and PCPs, and remanded portions of the rule regarding recordkeeping. In addition, EPA did not approve Kansas' rule incorporating EPA's 2007 revision of the definition

of "chemical processing plants" (the "Ethanol Rule,") (72 FR

24060, May 1, 2007) or EPA's 2008 "fugitive emissions rule," (73 FR 77882, December 19, 2008). Otherwise, Kansas' revisions also incorporate by reference the other provisions of 40 CFR 52.21 as in effect on July 1, 2011.

VII. What are the Additional Provisions of the March 1, 2013, SIP Submission that EPA is Proposing to Take Action On?

Within Kansas' March 1, 2013, SIP submission, Kansas amended rule KAR 28-19-350 "Prevention of Significant Deterioration (PSD) of Air Quality," to defer the application of the PSD permitting requirements to CO_2 emissions from bioenergy and other biogenic stationary sources pursuant to the July 20, 2011, EPA final rulemaking "Deferral for Carbon Dioxide (CO_2) Emissions from Bioenergy and other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs" (*see* 76 FR 43490). The Biomass Deferral delays until July 21, 2014, the consideration of CO_2 emissions from bioenergy and other biogenic sources (hereinafter referred to as "biogenic CO_2 emissions") when determining whether a stationary source meets the PSD and Title V applicability thresholds, including those for the application of Best Available Control Technology

(BACT). Stationary sources that combust biomass (or otherwise emit biogenic CO_2 emissions) and construct or modify during the deferral period will avoid the application of PSD to the biogenic CO_2 emissions resulting from those actions. The deferral applies only to biogenic CO_2 emissions and does not affect non-GHG pollutants or other GHG's (e.g., methane (CH_4) and nitrous oxide (N_2O)) emitted from the combustion of biomass fuel. Also, the deferral only pertains to biogenic CO_2 emissions in the PSD and Title V programs and does not pertain to any other EPA programs such as the GHG Reporting Program. Biogenic CO_2 emissions are defined as emissions of CO_2 from a stationary source directly resulting from the combustion or decomposition of biologically-based materials other than fossil fuels and mineral sources of carbon. Examples of "biogenic CO_2 emissions" include, but are not limited to:

- CO_2 generated from the biological decomposition of waste in landfills, wastewater treatment or manure management processes;
- CO_2 from the combustion of biogas collected from biological decomposition of waste in landfills, wastewater treatment or manure management processes;
- CO_2 from fermentation during ethanol production or other industrial fermentation processes;

- CO_2 from combustion of the biological fraction of municipal solid waste or biosolids;
- CO_2 from combustion of the biological fraction of tire-derived fuel; and
- CO_2 derived from combustion of biological material, including all types of wood and wood waste, forest residue, and agricultural material.

EPA recognizes that use of certain types of biomass can be part of the national strategy to reduce dependence on fossil fuels. Efforts are underway at the Federal, state and regional level to foster the expansion of renewable resources and promote bioenergy projects when they are a way to address climate change, increase domestic alternative energy production, enhance forest management and create related employment opportunities.

For stationary sources co-firing fossil fuel and biologically-based fuel, and/or combusting mixed fuels (e.g., tire derived fuels, municipal solid waste (MSW)), the biogenic CO_2 emissions from that combustion are included in the biomass deferral. However, the fossil fuel CO_2 emissions are not. Emissions of CO_2 from processing of mineral feedstocks (e.g., calcium carbonate) are also not included in the deferral. Various methods are available to calculate both the biogenic and fossil fuel portions of CO_2 emissions, including those methods contained in the GHG Reporting Program (40 CFR part 98).

Consistent with the other pollutants in PSD and Title V, there are no requirements to use a particular method in determining biogenic and fossil fuel CO_2 emissions.

EPA's final biomass deferral rule is an interim deferral for biogenic CO_2 emissions only and does not relieve sources of the obligation to meet the PSD and Title V permitting requirements for other pollutant emissions that are otherwise applicable to the source during the deferral period or that may be applicable to the source at a future date pending the results of EPA's study and subsequent rulemaking action. This means, for example, that if the deferral is applicable to biogenic CO_2 emissions from a particular source during the three-year effective period and the study and potential future rulemaking do not provide for a permanent exemption from PSD and Title V permitting requirements for the biogenic CO_2 emissions from a source with particular characteristics, then the deferral would end for that type of source and its biogenic CO_2 emissions would have to be appropriately considered in any applicability determinations that the source may need to conduct for future stationary source permitting purposes, consistent with the potential subsequent rulemaking and the Final Tailoring Rule (*e.g.*, a major source determination for Title V purposes or a major modification determination for PSD purposes).

EPA also wishes to clarify that we do not require that a PSD permit issued during the deferral period be amended or that any PSD requirements in a PSD permit existing at the time the deferral took effect, such as BACT limitations, be revised or removed from an effective PSD permit for any reason related to the deferral or when the deferral period expires. The regulation at 40 CFR Section 52.21(w) requires that any PSD permit shall remain in effect, unless and until it expires or it is rescinded, under the limited conditions specified in that provision. Thus, a PSD permit that is issued to a source while the deferral was effective need not be reopened or amended if the source is no longer eligible to exclude its biogenic CO_2 emissions from PSD applicability after the deferral expires. However, if such a source undertakes a modification that could potentially require a PSD permit and the source is not eligible to continue excluding its biogenic CO_2 emissions after the deferral expires, the source will need to consider its biogenic CO_2 emissions in assessing whether it needs a PSD permit to authorize the modification.

Any future actions to modify, shorten, or make permanent the deferral for biogenic sources are beyond the scope of the Biomass Deferral action and this proposed approval of the deferral into the Kansas SIP, and will be addressed through subsequent rulemaking. The results of EPA’s review of the

science related to net atmospheric impacts of biogenic CO_2 and the framework to properly account for such emissions in Title V and PSD permitting programs based on the study are prospective and unknown. Thus, we are unable to predict which biogenic CO_2 sources, if any, currently subject to the deferral as incorporated into the Kansas SIP could be subject to any permanent exemptions, or which currently deferred sources could be potentially required to account for their emissions.

Similar to our approach with the Tailoring Rule, EPA incorporated the biomass deferral into the regulations governing state programs and into the Federal PSD program by amending the definition of "subject to regulation" under 40 CFR sections 51.166 and 40 CFR 52.21 respectively. Kansas implements its PSD program by incorporating section 52.21 by reference in KAR 28-19-350. The Kansas submission incorporates by reference the (CFR) through July 1, 2011, in order to adopt the Biomass Deferral.

Based upon EPA's analysis of the required provisions of the July 20, 2011 Biomass Deferral rule and how Kansas meets these requirements, EPA is proposing to approve the March 1, 2013, Kansas SIP revision in order to adopt the Biomass Deferral.

VIII. What Action is EPA Proposing?

EPA proposes to approve the infrastructure SIP submissions from Kansas which address the requirements of CAA sections

110(a)(1) and (2) as applicable to the 1997 and 2006 NAAQS for $PM_{2.5}$. Based upon review of the State's infrastructure SIP submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS, and relevant statutory and regulatory authorities and provisions referenced in those submissions or referenced in Kansas' SIP, EPA believes that Kansas has the infrastructure to address all applicable required elements of sections 110(a)(1) and(2) (except otherwise noted) to ensure that the 1997 and 2006 $PM_{2.5}$ NAAQS are implemented in the state.

In addition, EPA proposes to approve two additional SIP submissions from Kansas, one addressing the Prevention of Significant Deterioration (PSD) program in Kansas as it relates to $PM_{2.5}$ (unless otherwise noted) and another SIP revision addressing the requirements of section 128 of the CAA, both of which support the requirements associated with infrastructure SIPs.

We are hereby soliciting comment on this proposed action. Final rulemaking will occur after consideration of any comments.

IX. Statutory and Executive Order Review

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA 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 action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this 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 (Public Law 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.

X. Statutory Authority

The statutory authority for this action is provided by Section 110 of the CAA, as amended (42 U.S.C. 7410).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Dated: April 5, 2013. Karl Brooks,

Regional Administrator,
Region 7.

[FR Doc. 2013-09053 Filed 04/16/2013 at 8:45 am; Publication Date: 04/17/2013]