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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R07-OAR-2015-0710; FRL-9937-09-Region 7]

Approval of Air Quality State Implementation Plans (SIP); State of Nebraska; Infrastructure SIP Requirements for the 2008 Ozone National Ambient Air Quality Standard in Regards to Section 110(a)(2)(D)(i)(I) - Prongs 1 and 2.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve elements of a State Implementation Plan (SIP) submission from the State of Nebraska addressing the applicable requirements of Clean Air Act (CAA) section 110 for the 2008 National Ambient Air Quality Standards (NAAQS) for Ozone (O_3). CAA section 110 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.

Specifically, EPA is proposing to approve Nebraska's SIP as it relates to section 110 (a) (2) (D) (i) (I) prongs 1 and 2, for the 2008 O₃ NAAQS.

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-2015-0710, to <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

Publicly available docket materials are available either electronically in www.regulations.gov or at the Environmental Protection Agency, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219. The Regional Office's official hours of business are Monday through Friday, 8:00 a.m. to 4:30 p.m., 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: Mr. Gregory Crable, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, 11201 Renner Boulevard, Lenexa, KS 66219; telephone number: (913) 551-7391; fax number: (913) 551-7065; email address: crable.gregory@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 a Section 110(a)(1) and (2) Infrastructure SIP?
- II. What are the Applicable Elements Under Sections 110(a)(1) and (2)?
- III. What is EPA's Approach to the Review of Infrastructure SIP Submissions?
- IV. What is EPA's Evaluation of How the State Addressed the Relevant Elements of Sections 110(a)(1) and (2)?
- V. What Action is EPA Proposing?
- VI. Statutory and Executive Order Review

I. 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.

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

On March 12, 2008, EPA promulgated a revised NAAQS for ozone based on 8-hour average concentrations. The level of the 2008 8-hour ozone NAAQS (hereafter the 2008 O₃ NAAQS) was revised from 0.08 parts per million (ppm) to 0.075 ppm (73 FR 16436).

For the 2008 O₃ NAAQS, states typically have met many of the basic program elements required in section 110(a)(2) through provisions adopted in earlier SIP submissions in connection with previous NAAQS. Nevertheless, pursuant to section 110(a)(1), states must review and revise, as appropriate, their existing SIPs to ensure that the SIPs are adequate to address the 2008 O₃ NAAQS. To assist states in meeting this statutory requirement, EPA issued guidance on September 13, 2013 (2013 Guidance),

addressing the infrastructure SIP elements required to be addressed under section 110 (a) (1) and (2) for the 2008 O₃ NAAQS.¹ In a previous final rulemaking (80 FR 55266, September 15, 2015) EPA addressed elements (A through C), (D)(i)(II), and (E through M). As discussed in that notice, EPA planned to take separate action on section 110(a)(2)(D)(i)(I)- prongs 1 and 2 on a timeline consistent with a deadline agreed to by the parties and entered by the court in *Sierra Club v. McCarthy* 4:14-cv-05091-YGR (N.D. Cal. May 15, 2015). In this action, EPA proposes action that, if finalized, fulfills that commitment to take final action as to Nebraska's SIP submission addressing section 110(a)(2)(D)(i)(I).

III. What is EPA's Approach to the Review of Infrastructure SIP Submissions?

EPA is acting upon the February 11, 2013, SIP submission from Nebraska that addresses the infrastructure requirements of CAA sections 110(a)(1) and 110(a)(2) for the 2008 O₃ NAAQS. The requirement for states to make a SIP submission of this type arises out of CAA section 110(a)(1). Pursuant to section 110(a)(1), states must make SIP submissions "within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality

¹ Stephen D. Page, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards, "Guidance on Infrastructure State Implementation Plan (SIP) Elements Under Clean Air Act Sections 110(a)(1) and 110(a)(2)," Memorandum to EPA Regional Air Division Directors, Regions I-X, September 13, 2013.

standard (or any revision thereof)," and these SIP submissions are to provide for the "implementation, maintenance, and enforcement" of such NAAQS. The statute directly imposes on states the duty to make these SIP submissions, and the requirement to make the submissions is not conditioned upon EPA taking any action other than promulgating a new or revised NAAQS. Section 110(a)(2) includes a list of specific elements that "[e]ach such plan" submission must address.

EPA has historically referred to these SIP submissions made for the purpose of satisfying the requirements of CAA sections 110(a)(1) and 110(a)(2) as "infrastructure SIP" submissions. Although the term "infrastructure SIP" does not appear in the CAA, EPA uses the term to distinguish this particular type of SIP submission from submissions that are intended to satisfy other SIP requirements under the CAA, such as "nonattainment SIP" or "attainment plan SIP" submissions to address the nonattainment planning requirements of part D of title I of the CAA, "regional haze SIP" submissions required by EPA rule to address the visibility protection requirements of CAA section 169A, and nonattainment new source review permit program submissions to address the permit requirements of CAA, title I, part D.

Section 110(a)(1) addresses the timing and general requirements for infrastructure SIP submissions, and section 110(a)(2) provides more details concerning the required contents of these submissions. The list of required elements provided in section 110(a)(2) contains a wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive program provisions, and some of which pertain to requirements for both authority and substantive program provisions.² EPA therefore believes that while the timing requirement in section 110(a)(1) is unambiguous, some of the other statutory provisions are ambiguous. In particular, EPA believes that the list of required elements for infrastructure SIP submissions provided in section 110(a)(2) contains ambiguities concerning what is required for inclusion in an infrastructure SIP submission.

The following examples of ambiguities illustrate the need for EPA to interpret some section 110(a)(1) and section 110(a)(2) requirements with respect to infrastructure SIP submissions for a given new or revised NAAQS. One example of ambiguity is that section 110(a)(2) requires that "each" SIP submission must meet the list of requirements therein, while EPA

² For example: section 110(a)(2)(E)(i) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a SIP-approved program to address certain sources as required by part C of title I of the CAA; and section 110(a)(2)(G) provides that states must have legal authority to address emergencies as well as contingency plans that are triggered in the event of such emergencies.

has long noted that this literal reading of the statute is internally inconsistent and would create a conflict with the nonattainment provisions in part D of title I of the Act, which specifically address nonattainment SIP requirements.³ Section 110(a)(2)(I) pertains to nonattainment SIP requirements and part D addresses when attainment plan SIP submissions to address nonattainment area requirements are due. For example, section 172(b) requires EPA to establish a schedule for submission of such plans for certain pollutants when the Administrator promulgates the designation of an area as nonattainment, and section 107(d)(1)(B) allows up to two years, or in some cases three years, for such designations to be promulgated.⁴ This ambiguity illustrates that rather than apply all the stated requirements of section 110(a)(2) in a strict literal sense, EPA must determine which provisions of section 110(a)(2) are applicable for a particular infrastructure SIP submission.

Another example of ambiguity within sections 110(a)(1) and 110(a)(2) with respect to infrastructure SIPs pertains to whether states must meet all of the infrastructure SIP requirements in a single SIP submission, and whether EPA must

³ See, e.g., “Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NOx SIP Call; Final Rule,” 70 FR 25162, at 25163 – 65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

⁴ EPA notes that this ambiguity within section 110(a)(2) is heightened by the fact that various subparts of part D set specific dates for submission of certain types of SIP submissions in designated nonattainment areas for various pollutants. Note, e.g., that section 182(a)(1) provides specific dates for submission of emissions inventories for the ozone NAAQS. Some of these specific dates are necessarily later than three years after promulgation of the new or revised NAAQS.

act upon such SIP submission in a single action. Although section 110(a)(1) directs states to submit "a plan" to meet these requirements, EPA interprets the CAA to allow states to make multiple SIP submissions separately addressing infrastructure SIP elements for the same NAAQS. If states elect to make such multiple SIP submissions to meet the infrastructure SIP requirements, EPA can elect to act on such submissions either individually or in a larger combined action.⁵ Similarly, EPA interprets the CAA to allow it to take action on the individual parts of one larger, comprehensive infrastructure SIP submission for a given NAAQS without concurrent action on the entire submission. For example, EPA has sometimes elected to act at different times on various elements and sub-elements of the same infrastructure SIP submission.⁶

⁵ See, e.g., "Approval and Promulgation of Implementation Plans; New Mexico; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) Permitting," 78 FR 4339 (January 22, 2013) (EPA's final action approving the structural PSD elements of the New Mexico SIP submitted by the State separately to meet the requirements of EPA's 2008 PM_{2.5} NSR rule), and "Approval and Promulgation of Air Quality Implementation Plans; New Mexico; Infrastructure and Interstate Transport Requirements for the 2006 PM_{2.5} NAAQS," (78 FR 4337) (January 22, 2013) (EPA's final action on the infrastructure SIP for the 2006 PM_{2.5} NAAQS).

⁶ On December 14, 2007, the State of Tennessee, through the Tennessee Department of Environment and Conservation, made a SIP revision to EPA demonstrating that the State meets the requirements of sections 110(a)(1) and (2). EPA proposed action for infrastructure SIP elements (C) and (J) on January 23, 2012 (77 FR 3213) and took final action on March 14, 2012 (77 FR 14976). On April 16, 2012 (77 FR 22533) and July 23, 2012 (77 FR 42997), EPA took separate proposed and final actions on all other section 110(a)(2) infrastructure SIP elements of Tennessee's December 14, 2007, submittal.

Ambiguities within sections 110(a)(1) and 110(a)(2) may also arise with respect to infrastructure SIP submission requirements for different NAAQS. Thus, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS. The states' attendant infrastructure SIP submissions for each NAAQS therefore could be different. For example, the monitoring requirements that a state might need to meet in its infrastructure SIP submission for purposes of section 110(a)(2)(B) could be very different for different pollutants, for example, because the content and scope of a state's infrastructure SIP submission to meet this element might be very different for an entirely new NAAQS than for a minor revision to an existing NAAQS.⁷

EPA notes that interpretation of section 110(a)(2) is also necessary when EPA reviews other types of SIP submissions required under the CAA. Therefore, as with infrastructure SIP submissions, EPA also has to identify and interpret the relevant elements of section 110(a)(2) that logically apply to these other types of SIP submissions. For example, section 172(c)(7) requires that attainment plan SIP submissions required by part D have to meet the "applicable requirements" of section 110(a)(2).

⁷ For example, implementation of the 1997 PM_{2.5} NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

Thus, for example, attainment plan SIP submissions must meet the requirements of section 110(a)(2)(A) regarding enforceable emission limits and control measures and section 110(a)(2)(E)(i) regarding air agency resources and authority. By contrast, it is clear that attainment plan SIP submissions required by part D would not need to meet the portion of section 110(a)(2)(C) that pertains to the PSD program required in part C of title I of the CAA, because PSD does not apply to a pollutant for which an area is designated nonattainment and thus subject to part D planning requirements. As this example illustrates, each type of SIP submission may implicate some elements of section 110(a)(2) but not others.

Given the potential for ambiguity in some of the statutory language of section 110(a)(1) and section 110(a)(2), EPA believes that it is appropriate to interpret the ambiguous portions of section 110(a)(1) and section 110(a)(2) in the context of acting on a particular SIP submission. In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the NAAQS in question or the history of SIP development for the relevant pollutant, would meet each of the requirements, or meet each of them in the same way. Therefore, EPA has adopted an approach

under which it reviews infrastructure SIP submissions against the list of elements in section 110(a)(2), but only to the extent each element applies for that particular NAAQS.

Historically, EPA has elected to use guidance documents to make recommendations to states for infrastructure SIPs, in some cases conveying needed interpretations on newly arising issues and in some cases conveying interpretations that have already been developed and applied to individual SIP submissions for particular elements.⁸ EPA most recently issued guidance for infrastructure SIPs on September 13, 2013 (2013 Guidance).⁹ EPA developed the 2013 Guidance document to provide states with up-to-date guidance for infrastructure SIPs for any new or revised NAAQS. Within the 2013 guidance, EPA describes the duty of states to make infrastructure SIP submissions to meet basic structural SIP requirements within three years of promulgation of a new or revised NAAQS. EPA also made recommendations about many specific subsections of section 110(a)(2) that are relevant

⁸ EPA notes, however, that nothing in the CAA requires EPA to provide guidance or to promulgate regulations for infrastructure SIP submissions. The CAA directly applies to states and requires the submission of infrastructure SIP submissions, regardless of whether or not EPA provides guidance or regulations pertaining to such submissions. EPA elects to issue such guidance in order to assist states, as appropriate.

⁹ “Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2),” Memorandum from Stephen D. Page, September 13, 2013.

in the context of infrastructure SIP submissions.¹⁰ The guidance also discusses the substantively important issues that are germane to certain subsections of section 110(a)(2). Significantly, EPA interprets sections 110(a)(1) and 110(a)(2) such that infrastructure SIP submissions need to address certain issues and need not address others. Accordingly, EPA reviews each infrastructure SIP submission for compliance with the applicable statutory provisions of section 110(a)(2), as appropriate.

As an example, section 110(a)(2)(E)(ii) is a required element of section 110(a)(2) for infrastructure SIP submissions. Under this element, a state must meet the substantive requirements of section 128, which pertain to state boards that approve permits or enforcement orders and heads of executive agencies with similar powers. Thus, EPA reviews infrastructure SIP submissions to ensure that the state's SIP appropriately addresses the requirements of section 110(a)(2)(E)(ii) and section 128. The 2013 Guidance explains EPA's interpretation that there may be a variety of ways by which states can appropriately address these substantive statutory requirements,

¹⁰ EPA's September 13, 2013, guidance did not make recommendations with respect to infrastructure SIP submissions to address section 110(a)(2)(D)(i)(I). EPA issued the guidance shortly after the U.S. Supreme Court agreed to review the D.C. Circuit decision in *EME Homer City*, 696 F.3d 7 (D.C. Cir. 2012) which had interpreted the requirements of section 110(a)(2)(D)(i)(I). In light of the uncertainty created by this litigation (which culminated in the Supreme Court's April 29, 2014 decision at 134 S.Ct. 1584), EPA elected not to provide additional guidance on the requirements of section 110(a)(2)(D)(i)(I) at that time. As the guidance is neither binding nor required by statute, whether EPA elects to provide guidance on a particular section has no impact on a state's CAA obligations.

depending on the structure of an individual state's permitting or enforcement program (e.g., whether permits and enforcement orders are approved by a multi-member board or by a head of an executive agency). However they are addressed by the state, the substantive requirements of section 128 are necessarily included in EPA's evaluation of infrastructure SIP submissions because section 110(a)(2)(E)(ii) explicitly requires that the state satisfy the provisions of section 128.

As another example, EPA's review of infrastructure SIP submissions with respect to the PSD program requirements in sections 110(a)(2)(C), (D)(i)(II), and (J) focuses upon the structural PSD program requirements contained in part C and EPA's PSD regulations. Structural PSD program requirements include provisions necessary for the PSD program to address all regulated sources and New Source Review (NSR) pollutants, including greenhouse gases (GHGs). By contrast, structural PSD program requirements do not include provisions that are not required under EPA's regulations at 40 CFR 51.166 but are merely available as an option for the state, such as the option to provide grandfathering of complete permit applications with respect to the 2012 PM_{2.5} NAAQS. Accordingly, the latter optional provisions are types of provisions EPA considers irrelevant in the context of an infrastructure SIP action.

For other section 110(a)(2) elements, however, EPA's review of a state's infrastructure SIP submission focuses on assuring that the state's SIP meets basic structural requirements. For example, section 110(a)(2)(C) includes, *inter alia*, the requirement that states have a program to regulate minor new sources. Thus, EPA evaluates whether the state has an EPA-approved minor NSR program and whether the program addresses the pollutants relevant to that NAAQS. In the context of acting on an infrastructure SIP submission, however, EPA does not think it is necessary to conduct a review of each and every provision of a state's existing minor source program (*i.e.*, already in the existing SIP) for compliance with the requirements of the CAA and EPA's regulations that pertain to such programs.

With respect to certain other issues, EPA does not believe that an action on a state's infrastructure SIP submission is necessarily the appropriate type of action in which to address possible deficiencies in a state's existing SIP. These issues include: (i) existing provisions related to excess emissions from sources during periods of startup, shutdown, or malfunction 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 may be contrary to the CAA because they purport to allow revisions to SIP-approved emissions limits while limiting public process or

not requiring further approval by EPA; and (iii) 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 72 FR 32526 (June 13, 2007) ("NSR Reform"). Thus, EPA believes it may approve an infrastructure SIP submission without scrutinizing the totality of the existing SIP for such potentially deficient provisions and may approve the submission even if it is aware of such existing provisions.¹¹ It is important to note that EPA's approval of a state's infrastructure SIP submission should not be construed as explicit or implicit re-approval of any existing potentially deficient provisions that relate to the three specific issues just described.

EPA's approach to review of infrastructure SIP submissions is to identify the CAA requirements that are logically applicable to that submission. EPA believes that this approach to the review of a particular infrastructure SIP submission is appropriate, because it would not be reasonable to read the general requirements of section 110(a)(1) and the list of elements in section 110(a)(2) as requiring review of each and every provision of a state's existing SIP against all requirements in the CAA and EPA regulations merely for purposes

¹¹ By contrast, EPA notes that if a state were to include a new provision in an infrastructure SIP submission that contained a legal deficiency, such as a new exemption for excess emissions during SSM events, then EPA would need to evaluate that provision for compliance against the rubric of applicable CAA requirements in the context of the action on the infrastructure SIP.

of assuring that the state in question has the basic structural elements for a functioning SIP for a new or revised NAAQS. Because SIPs have grown by accretion over the decades as statutory and regulatory requirements under the CAA have evolved, they may include some outmoded provisions and historical artifacts. These provisions, while not fully up to date, nevertheless may not pose a significant problem for the purposes of "implementation, maintenance, and enforcement" of a new or revised NAAQS when EPA evaluates adequacy of the infrastructure SIP submission. EPA believes that a better approach is for states and EPA to focus attention on those elements of section 110(a)(2) of the CAA most likely to warrant a specific SIP revision due to the promulgation of a new or revised NAAQS or other factors.

For example, EPA's 2013 Guidance gives simpler recommendations with respect to carbon monoxide than other NAAQS pollutants to meet the visibility requirements of section 110(a)(2)(D)(i)(II), because carbon monoxide does not affect visibility. As a result, an infrastructure SIP submission for any future new or revised NAAQS for carbon monoxide need only state this fact in order to address the visibility prong of section 110(a)(2)(D)(i)(II).

Finally, EPA believes that its approach with respect to infrastructure SIP requirements is based on a reasonable reading

of sections 110(a)(1) and 110(a)(2) because the CAA provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow EPA to take appropriately tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a "SIP call" whenever the Agency determines that a state's SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or to otherwise comply with the CAA.¹² Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.¹³ Significantly, EPA's determination that an action on a state's infrastructure SIP submission is not the appropriate time and place to address all potential existing SIP deficiencies does not preclude EPA's subsequent reliance on provisions in section 110(a)(2) as part of the basis for action to correct those deficiencies at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director's discretion provisions in the course of acting on an

¹² For example, EPA issued a SIP call to Utah to address specific existing SIP deficiencies related to the treatment of excess emissions during SSM events. See "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revisions," 74 FR 21639 (April 18, 2011).

¹³ EPA has used this authority to correct errors in past actions on SIP submissions related to PSD programs. See "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule," 75 FR 82536 (December 30, 2010). EPA has previously used its authority under CAA section 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. See, e.g., 61 FR 38664 (July 25, 1996) and 62 FR 34641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67062 (November 16, 2004) (corrections to California SIP); and 74 FR 57051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

infrastructure SIP submission, EPA believes that section 110(a)(2)(A) may be among the statutory bases that EPA relies upon in the course of addressing such deficiency in a subsequent action.¹⁴

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

EPA Region 7 received Nebraska's infrastructure SIP submission for the 2008 O₃ standard on February 11, 2013. The SIP submission became complete as a matter of law on August 11, 2013. EPA has reviewed Nebraska's infrastructure SIP submission and the applicable statutory and regulatory authorities and provisions referenced in those submissions or referenced in Nebraska's SIP. EPA has previously approved sections 110(a)(2)(A), (B), (C), (D)(i)(II)- prong 3, (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M); did not propose any action on section 110(a)(2)(I)- Nonattainment Area Plan or Plan Revisions under part D; and disapproved 110(a)(2)(D)(i)(II) - prong 4, as

¹⁴ See, e.g., EPA's disapproval of a SIP submission from Colorado on the grounds that it would have included a director's discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, e.g., 75 FR 42342 at 42344 (July 21, 2010) (proposed disapproval of director's discretion provisions); 76 FR 4540 (January 26, 2011) (final disapproval of such provisions).

it relates to the protection of visibility (80 FR 55266, September 15, 2015). EPA also stated that it would take action on section 110(a)(2)(D)(i)(I) – prongs 1 and 2 at a later time (80 FR 35290). A discussion of that action follows.

On March 12, 2008, the EPA revised the levels of the primary and secondary 8-hour ozone standards from 0.08 parts per million (ppm) to 0.075 ppm (73 FR 16436). The CAA requires states to submit, within three years after promulgation of a new or revised standard, SIPs meeting the applicable “infrastructure” elements of sections 110(a)(1) and (2). One of these applicable infrastructure elements, CAA section 110(a)(2)(D)(i), requires SIPs to contain “good neighbor” provisions to prohibit certain adverse air quality effects on neighboring states due to interstate transport of pollution. There are four sub-elements (or prongs) within CAA section 110(a)(2)(D)(i). This action addresses the first two sub-elements of the good neighbor provisions, at CAA section 110(a)(2)(D)(i)(I). These sub-elements require that each SIP for a new or revised standard contain adequate provisions to prohibit any source or other type of emissions activity within the state from emitting air pollutants that will “contribute significantly to nonattainment” or “interfere with maintenance” of the applicable air quality standard in any other state. We note that the EPA has addressed the interstate transport

requirements of CAA section 110(a)(2)(D)(i)(I) for the eastern portion of the United States in several past regulatory actions.¹⁵ We most recently promulgated the Cross-State Air Pollution Rule (CSAPR), which addressed CAA section 110(a)(2)(D)(i)(I) in the eastern portion of the United States.

¹⁶ CSAPR addressed multiple national ambient air quality standards, but did not address the 2008 8-hour ozone standard.¹⁷

In CSAPR, the EPA used detailed air quality analyses to determine whether an eastern state's contribution to downwind air quality problems was at or above specific thresholds. If a state's contribution did not exceed the specified air quality screening threshold, the state was not considered "linked" to identified downwind nonattainment and maintenance receptors and was therefore not considered to significantly contribute or interfere with maintenance of the standard in those downwind areas. If a state exceeded that threshold, the state's emissions were further evaluated, taking into account both air quality and cost considerations, to determine what, if any, emissions reductions might be necessary. For the reasons stated below, we believe it is appropriate to use the same approach we used in

¹⁵ NO_x SIP Call, 63 FR 57371 (October 27, 1998); Clean Air Interstate Rule (CAIR), 70 FR 25172 (May 12, 2005); Cross-State Air Pollution Rule (CSAPR), 76 FR 48208 (August 8, 2011).

¹⁶ 76 FR 48208.

¹⁷ CSAPR addressed the 1997 8-hour ozone, and the 1997 and 2006 fine particulate matter NAAQS.

CSAPR to establish an air quality screening threshold for the evaluation of interstate transport requirements for the 2008 ozone standard.

In CSAPR, the EPA proposed an air quality screening threshold of one percent of the applicable NAAQS and requested comment on whether one percent was appropriate.¹⁸ The EPA evaluated the comments received and ultimately determined that one percent was an appropriately low threshold because there were important, even if relatively small, contributions to identified nonattainment and maintenance receptors from multiple upwind states. In response to commenters who advocated a higher or lower threshold than one percent, the EPA compiled the contribution modeling results for CSAPR to analyze the impact of different possible thresholds for the eastern United States. The EPA's analysis showed that the one-percent threshold captures a high percentage of the total pollution transport affecting downwind states, while the use of higher thresholds would exclude increasingly larger percentages of total transport. For example, at a five percent threshold, the majority of interstate pollution transport affecting downwind receptors would be excluded.¹⁹ In addition, the EPA determined that it was important to use a relatively lower one-percent threshold because there

¹⁸ CSAPR proposal, 75 FR 45210, 45237 (August 2, 2010).

¹⁹ See also Air Quality Modeling Final Rule Technical Support Document, Appendix F, Analysis of Contribution Thresholds, Docket ID #EPA-HQ-OAR-2009-0491-4140.

are adverse health impacts associated with ambient ozone even at low levels.²⁰ The EPA also determined that a lower threshold such as 0.5 percent would result in relatively modest increases in the overall percentages of fine particulate matter and ozone pollution transport captured relative to the amounts captured at the one-percent level. The EPA determined that a "0.5 percent threshold could lead to emission reduction responsibilities in additional states that individually have a very small impact on those receptors – an indicator that emission controls in those states are likely to have a smaller air quality impact at the downwind receptor. We are not convinced that selecting a threshold below one percent is necessary or desirable."²¹

In the final CSAPR, the EPA determined that one percent was a reasonable choice considering the combined downwind impact of multiple upwind states in the eastern United States, the health effects of low levels of fine particulate matter and ozone pollution, and the EPA's previous use of a one-percent threshold in CAIR. The EPA used a single "bright line" air quality threshold equal to one percent of the 1997 8-hour ozone standard, or 0.08 ppm.²² The projected contribution from each state was averaged over multiple days with projected high modeled ozone, and then compared to the one-percent threshold.

²⁰ CSAPR, 76 FR 48208, 48236–37 (August 8, 2011).

²¹ *Id.*

²² *Id.*

We concluded that this approach for setting and applying the air quality threshold for ozone was appropriate because it provided a robust metric, was consistent with the approach for fine particulate matter used in CSAPR, and because it took into account, and would be applicable to, any future ozone standards below 0.08 ppm.²³

On August 4, 2015, the EPA issued a Notice of Data Availability (NODA) containing air quality modeling data that applies the CSAPR approach to contribution projections for the year 2017 for the 2008 8-hour ozone NAAQS.²⁴ The moderate area attainment date for the 2008 ozone standard is July 11, 2018. In order to demonstrate attainment by this attainment deadline, states will use 2015 through 2017 ambient ozone data. Therefore, 2017 is an appropriate future year to model for the purpose of examining interstate transport for the 2008 ozone NAAQS. The EPA used photochemical air quality modeling to project ozone concentrations at air quality monitoring sites to 2017 and estimated state-by-state ozone contributions to those 2017 concentrations. This modeling used the Comprehensive Air Quality Model with Extensions (CAMx version 6.11) to model the 2011 base year, and the 2017 future base case emissions scenarios to identify projected nonattainment and maintenance sites with

²³ *Id.*

²⁴ See 80 FR 46271 (August 4, 2015) (Notice of Availability of the Environmental protection Agency's Updated Ozone Transport Modeling Data for the 2008 Ozone National Ambient Air Quality Standard (NAAQS)).

respect to the 2008 ozone NAAQS in 2017. The EPA used nationwide state-level ozone source apportionment modeling (CAMx Ozone Source Apportionment Technology/Anthropogenic Precursor Culpability Analysis technique) to quantify the contribution of 2017 base case NO_x and VOC emissions from all sources in each state to the 2017 projected receptors. The air quality model runs were performed for a modeling domain that covers the 48 contiguous United States and adjacent portions of Canada and Mexico. The NODA and the supporting technical support documents have been included in the docket for this SIP action.

The modeling data released in the NODA on July 23, 2015, is the most up-to-date information the EPA has developed to inform our analysis of upwind state linkages to downwind air quality problems. For purposes of evaluating Nebraska's interstate transport SIP with respect to the 2008 8-hour ozone standard, the EPA is proposing that states whose contributions are less than one percent to downwind nonattainment and maintenance receptors are considered non-significant. The modeling indicates that Nebraska's largest contribution to any projected downwind nonattainment site is 0.51 ppb and Nebraska's largest contribution to any projected downwind maintenance-only site is 0.36 ppb. 80 FR 46271.²⁵ These values are below the one percent

²⁵ Largest Ozone Contributions From Each State to Downwind 2017 Projected Nonattainment and to 2017 Projected Maintenance-only sites, specific to the state of Nebraska are found in Table 3 at 80 FR 46277.

screening threshold of 0.75 ppb, and therefore there are no identified linkages between Nebraska and 2017 downwind projected nonattainment and maintenance sites. Note that the EPA has not done an assessment to determine the applicability for the use of the one percent screening threshold for western states that contribute above the one percent threshold. There may be additional considerations that may impact regulatory decisions regarding "potential" linkages in the West identified by the modeling.

The State of Nebraska submitted a SIP on February 11, 2013. The SIP states that Nebraska does not contribute significantly to nonattainment in, or interfere with maintenance by, any other state with regards to the 2008 O₃ NAAQS. To support this conclusion, Nebraska cited modeling that EPA conducted for purposes of evaluating upwind contributions to downwind air quality in the CSAPR rulemaking. See 76 FR 48244 (Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals; Final Rule). Nebraska noted EPA's statement in that action, that states "which contribute 0.8 ppb or more to 8-hour ozone nonattainment or maintenance in another state are identified as states with contributions to downwind attainment and maintenance sites large enough to warrant further analysis." Nebraska noted that 0.8 ppb cutoff equates to a one percent threshold, which was the

threshold EPA used in that rulemaking for the previous 1997 ozone NAAQS. According to Nebraska, the rule stands for the proposition that "states whose contributions are below these thresholds do not significantly contribute or interfere with maintenance of the relevant NAAQS." Nebraska noted that, pursuant to the modeling discussed in that rule (76 FR 48245), Nebraska's largest downwind contribution to any identified nonattainment or maintenance receptors for ozone was 0.2 ppb. Nebraska concluded that because this modeling contribution represents far less than one percent of the 2008 ozone NAAQS at issue here, it "does not have any obligations" to reduce emissions to address interstate transport as to that standard.

The EPA notes that the modeling Nebraska relies upon was conducted by EPA in 2011, for purposes of evaluating upwind state contributions and downwind air quality problems as to a prior, less-stringent ozone NAAQS, and that the modeling evaluated a 2012 compliance year. Accordingly, the fact that this modeling showed downwind contribution less than one percent of the 2008 ozone NAAQS is not necessarily dispositive of

Nebraska's obligations under section 110(a)(2)(D)(i)(I).²⁶

However, as discussed above, the EPA has conducted more updated modeling subsequent to the state's SIP submission that confirms the underlying conclusion of our 2011 modeling, and of Nebraska's SIP submission.

Based on the modeling data and the information and analysis provided in Nebraska's SIP, EPA is proposing to approve Nebraska's interstate transport SIP for purposes of meeting the CAA section 110(a)(2)(D)(i)(I) requirements as to the 2008 ozone standard. The EPA's modeling confirms the results of the State's analysis: Nebraska does not significantly contribute to nonattainment or interfere with maintenance of the 2008 ozone standard in any other state.

V. What Action is EPA Proposing?

Based upon review of the state's infrastructure SIP submission for the 2008 O₃ NAAQS, with respect to the requirements of section 110(a)(2)(D(i)(I) – prongs 1 and 2, and relevant statutory and regulatory authorities and provisions referenced in these submissions or referenced in Nebraska's SIP,

²⁶ Nebraska's SIP submission appears to rely on EPA's 2011 air quality modeling because at that time, the D.C. Circuit's decision in *EME Homer City Generation, L.P. v. EPA* held that EPA must first quantify each state's transport obligation before states had an obligation to make a SIP submission. See 696 F.3d 7 (D.C. Cir. 2012). Accordingly, Nebraska cites a November 19, 2012, memorandum from Assistant Administrator Gina McCarthy, which describes the D.C. Circuit's holding that "a SIP cannot be deemed deficient for failing to meet the good neighbor obligation before the EPA quantifies that obligation." See Memo at 2, available at http://www3.epa.gov/airtransport/pdfs/CSAPR_Memo_to_Regions.pdf. The memorandum also communicated the Agency's intentions to "act in accordance with the [D.C. Circuit] decision during the pendency of the appeal," *id.*, but on appeal the Supreme Court reversed that holding. See *EPA v. EME Homer City Gen.*, 134 S. Ct. 1584, 1609–10 (2014).

EPA is proposing to approve this element of the February 11, 2013 SIP submission.

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

VI. 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" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).
- 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).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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, Reporting and recordkeeping requirements.

Dated: November 2, 2015.

Mark Hague,
Regional Administrator,
Region 7.