



6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R08-OAR-2018-0616; FRL-9984-79-Region 8]**

**Approval and Promulgation of State Implementation Plans; North Dakota; Revisions to Infrastructure Requirements for All National Ambient Air Quality Standards; Carbon Monoxide (CO); Lead (Pb); Nitrogen Dioxide (NO<sub>2</sub>); Ozone (O<sub>3</sub>); Particle Pollution (PM<sub>2.5</sub>, PM<sub>10</sub>); Sulfur Dioxide (SO<sub>2</sub>); Recodification**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve revisions to the North Dakota State Implementation Plan (SIP) for all National Ambient Air Quality Standards (NAAQS) for the purposes of transferring authority from the North Dakota Department of Health (NDDH) to the North Dakota Department of Environmental Quality (NDDEQ). We are also proposing to approve the related recodification of the portions of North Dakota's Air Pollution Rules that have been previously approved into the SIP. The EPA is taking this action pursuant to section 110 of the Clean Air Act (CAA).

**DATES:** Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R08-OAR-2018-0616, to the Federal Rulemaking Portal: <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [www.regulations.gov](http://www.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>.

*Docket:* All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, e.g., 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 in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. The EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Kate Gregory, Air Program, EPA, Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-6175, [gregory.kate@epa.gov](mailto:gregory.kate@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

## **I. Background**

The North Dakota state legislature created a new NDDEQ in 2017.<sup>1</sup> The NDDEQ will assume all the duties and responsibilities of the NDDH’s Environmental Health Section. To accommodate the new NDDEQ, the North Dakota Air Pollution Control Law was recodified in the North Dakota Century Code (NDCC) as NDCC 23.1-06 and the Air Pollution Rules were recodified in the North Dakota Administrative Code (NDAC) as NDAC 33.1-15.

Among the duties of the new NDDEQ is the implementation and enforcement of North Dakota’s SIP. The basic requirements for a state agency with respect to its authority and ability to implement and enforce a SIP are provided in the “infrastructure” elements of CAA section 110(a)(2). After the promulgation of a new or revised NAAQS, states must submit an “infrastructure” SIP to address the relevant elements of section 110(a)(2). The EPA has issued guidance to states on how to meet these elements in their infrastructure SIP submissions, and the guidance specifically identifies elements for which states should show they have the proper authority.<sup>2</sup>

Prior to the creation of NDDEQ, the NDDH submitted several infrastructure SIP revisions to address the promulgation and revision of various NAAQS. The EPA approved these in several actions and by approving these actions, we determined that NDDH met, among other

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<sup>1</sup> North Dakota Senate Bill 2327.

<sup>2</sup> Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2), September 2013. For additional details on the EPA’s general interpretation of the requirements under sections 110(a)(1) and 110(a)(2) and approach to review of infrastructure SIPs, please see 82 FR 29457, 29458-59 (June 29, 2017).

things, the relevant requirements in section 110(a)(2) with respect to NDDH's authority and ability to implement and enforce North Dakota's SIP.<sup>3</sup>

On August 6, 2018, the state submitted a revision to their prior infrastructure SIPs to address the transfer of authority from the NDDH Environmental Health Section to the NDDEQ. The state also submitted the recodified Air Pollution Rules that had been previously adopted into the SIP. The state held a public hearing regarding the transfer of authority on June 5, 2018.<sup>4</sup> No comments were received during both the public hearing and the public comment period regarding the proposed changes.

## **II. The EPA's Evaluation**

North Dakota's SIP submittal addresses the transfer of authority as follows. First, the submittal identifies the citations to the NDCC and NDAC contained in previous infrastructure SIP submittals that the EPA has approved. The submittal provides a crosswalk with references to the recodified NDCC and NDAC to show the new location of these authorities.<sup>5</sup> The submittal also quotes a specific provision of Senate Bill 2327 that provides, among other things, that all "orders, determinations, and permits" made by NDDH before the transfer of authority remain in effect. Finally, the submittal notes that NDDEQ will be funded and staffed at the same level as the Environmental Health Division in NDDH previously was.

For purposes of the transfer of authority, we note the following elements of section 110(a)(2) as particularly relevant:

- 110(a)(2)(B): authority to operate an ambient air quality monitoring network;
- 110(a)(2)(C): authority to enforce the SIP;

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<sup>3</sup> See, for example, 82 FR 46681 (October 6, 2017), 80 FR 60540 (October 7, 2015), 78 FR 45866 (July 30, 2013).

<sup>4</sup> ND iSIP Revision Submission, p.17.

<sup>5</sup> A version of this crosswalk created by the EPA is also provided in the docket for this rulemaking.

- 110(a)(2)(C): authority to regulate the modification and construction of stationary sources to assure the NAAQS are achieved (known as minor new source review);
- 110(a)(2)(C): authority to implement a permit program as required in part C of title I of the Act (known as prevention of significant deterioration);
- 110(a)(2)(E)(i): adequate personnel, funding, and authority to carry out the implementation plan;
- 110(a)(2)(F): authority to require installation, maintenance, and replacement of monitoring equipment by stationary sources; to require periodic reporting on emissions from such sources; and to correlate such reports with emission limitations;
- 110(a)(2)(G): authority comparable to that in CAA section 303 (emergency authority to restrain pollution presenting an imminent and substantial endangerment);
- 110(a)(2)(H): authority to revise the SIP as necessary;
- 110(a)(2)(J): authority to provide public notification as required under CAA section 127;
- 110(a)(2)(K): authority to require such air quality modeling as prescribed by the Administrator and to submit modeling data on request to the Administrator; and
- 110(a)(2)(L): authority to require permitting fees.

These elements are described in detail in the 2013 guidance cited above. As the recodification of the NDCC and NDAC leave the substance of the relevant provisions cited in the submittal unmodified, the reasons that we have previously approved NDDH as having sufficient legal authority to address each of these and other infrastructure elements continue to apply. Please see the previous approval notices for details of those reasons, which we propose to adopt in this action.

With respect to enforcement and implementation of permits and enforcement orders that were previously issued under the SIP by NDDH, we propose that the language in Senate Bill 3727 quoted in the SIP submittal adequately addresses the authority of NDDEQ to continue to enforce and implement those permits and enforcement orders. Finally, as we have previously approved the state's infrastructure SIP as containing the necessary assurances that NDDH had adequate personnel and funding, and NDDEQ will continue at the same levels of personnel and funding, we propose that the requirements in 110(a)(2)(E)(i) regarding personnel and funding are met.

As part of the SIP submittal, in Section VI, the state provided an opinion from the North Dakota Attorney General. The opinion addresses the fundamental SIP legal authorities enumerated in 40 CFR 51.230, which consists of authority to:

- Adopt emission standards, limitations, and other control measures as necessary for attainment and maintenance of the NAAQS;
- Enforce SIP provisions, including seeking injunctive relief;
- Abate emission on an emergency basis to prevent substantial endangerment;
- Prevent construction, modification, or operation of a facility that may result in emissions that prevent attainment and maintenance of the NAAQS;
- Obtain information necessary to determine compliance with the SIP, including authority to require recordkeeping, make inspections, and conduct tests; and
- Require owners or operators of stationary sources to install, maintain, and operate monitoring devices and make periodic reports to the state on emissions from the sources.

The Attorney General's opinion cites the specific provisions of state law that provide these fundamental authorities. Based on this opinion, and the revisions to the state's infrastructure SIP

discussed above, the EPA proposes to approve the transfer of authority embodied in the state's submittal.

Finally, Section IV of the submittal contains the recodified Air Pollution Rules that have been previously approved into North Dakota's SIP.<sup>6</sup> North Dakota's submittal indicates that the state is not resubmitting the entire SIP. Instead, the state is only updating the numbering of the provisions that have previously been approved into the SIP, as well as replacing the obsolete references to the NDDH with references to the NDDEQ. In this case, our review is limited to the renumbering and name change, and not the substance of the rules.<sup>7</sup> We therefore propose to approve the recodification and change in name as appropriate and consistent with the transfer of authority. Our proposed approval is limited to the recodification and change in name and does not re-approve the substantive rules in North Dakota's SIP.

All revisions to the North Dakota SIP would be federally enforceable as of the effective date of the EPA's approval of this submission. The state plans to rely on the date when the EPA signs the final notice for purposes of notifying the state legislature that the EPA has approved these revisions, which will provide for the transfer authority from NDDH to NDDEQ to be effective under state law. Prior to the effective date of this approval, the state intends to take the necessary additional steps as specified in S.L. 2017, ch. 199, Section 1, to ensure that NDDEQ rules and the NDDEQ would become federally enforceable on the effective date of the EPA's approval. Unless and until the NDDEQ rules and agency become fully effective under federal law, for purposes of federal law the EPA recognizes the state's program as currently approved under the NDDH.

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<sup>6</sup> For purposes of cross-referencing a recodified provision with its previous version, we note that the recodification followed a consistent scheme: all rules previously codified as 33-15-xx-xx are now codified as 33.1-15-xx-xx.

<sup>7</sup> See "Review of State Regulation Recodification," Memorandum from Johnnie L. Pearson to Air Branch Chiefs, Regions I-X, Feb. 12, 1990.

### **III. Proposed Action**

We are proposing to approve the August 18, 2018 revisions to the North Dakota infrastructure SIP, for all NAAQS, for the purposes of the transfer of authority from NDDH to the NDDEQ. We are also proposing to approve the corresponding recodification of the entire SIP.

### **IV. Incorporation by Reference**

In this document, the EPA is proposing to include regulatory text in an EPA final rule that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the NDDEQ rules discussed in section II of this preamble. The EPA has made, and will continue to make, these materials generally available through [www.regulations.gov](http://www.regulations.gov) and at the EPA Region 8 Office (please contact the person identified in the “For Further Information Contact” section of this preamble for more information).

### **V. Statutory and Executive Order Reviews**

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

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- 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, 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 proposed 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).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Greenhouse gases, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: October 3, 2018.

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Douglas Benevento,  
Regional Administrator,  
EPA Region 8.

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