

the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

#### C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 3, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of

such rule or action. This action pertaining to West Virginia's section 110(a)(2) infrastructure requirements for the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS, and the 2006 PM<sub>2.5</sub> NAAQS, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

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

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: July 22, 2011.

W.C. Early,

Acting, Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

#### PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

#### Subpart XX—West Virginia

■ 2. In § 52.2520, the table in paragraph (e) is amended by adding entries at the end of the table for Section 110(a)(2) Infrastructure Requirements for the 1997 8-Hour Ozone NAAQS, Section 110(a)(2) Infrastructure Requirements for the 1997 PM<sub>2.5</sub> NAAQS, and Section 110(a)(2) Infrastructure Requirements for the 2006 PM<sub>2.5</sub> NAAQS. The amendments read as follows:

#### § 52.2520 Identification of plan.

\* \* \* \* \*

(e) \* \* \*

| Name of non-regulatory SIP revision                                                 | Applicable geographic area | State submittal date             | EPA approval date                                      | Additional explanation                                                                                                                             |
|-------------------------------------------------------------------------------------|----------------------------|----------------------------------|--------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------|
| * * *                                                                               | * * *                      | * * *                            | * * *                                                  | * * *                                                                                                                                              |
| Section 110(a)(2) Infrastructure Requirements for the 1997 8-Hour Ozone NAAQS.      | Statewide .....            | 12/3/07, 5/21/08                 | 8/4/11 [Insert page number where the document begins]. | This action addresses the following CAA elements or portions thereof: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). |
| Section 110(a)(2) Infrastructure Requirements for the 1997 PM <sub>2.5</sub> NAAQS. | Statewide .....            | 4/3/08, 5/21/08, 7/9/08, 3/18/10 | 8/4/11 [Insert page number where the document begins]. | This action addresses the following CAA elements or portions thereof: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). |
| Section 110(a)(2) Infrastructure Requirements for the 2006 PM <sub>2.5</sub> NAAQS. | Statewide .....            | 10/1/09, 3/18/10                 | 8/4/11 [Insert page number where the document begins]. | This action addresses the following CAA elements or portions thereof: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). |

[FR Doc. 2011-19692 Filed 8-3-11; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R03-OAR-2010-0158; FRL-9447-7]

#### Approval and Promulgation of Air Quality Implementation Plans; Delaware; Section 110(a)(2) Infrastructure Requirements for the 1997 8-Hour Ozone and the 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards

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

**ACTION:** Final rule.

**SUMMARY:** EPA is approving submittals from the State of Delaware pursuant to the Clean Air Act (CAA) sections 110(k)(2) and (3). These submittals

address the infrastructure elements specified in the CAA section 110(a)(2), necessary to implement, maintain, and enforce the 1997 8-hour ozone and fine particulate matter (PM<sub>2.5</sub>) national ambient air quality standards (NAAQS) and the 2006 PM<sub>2.5</sub> NAAQS. This final rule is limited to the following infrastructure elements which were subject to EPA's completeness findings pursuant to CAA section (k)(1) for the 1997 8-hour ozone NAAQS dated March 27, 2008 and the 1997 PM<sub>2.5</sub> NAAQS dated October 22, 2008: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M), or portions thereof.

**DATES:** *Effective Date:* This final rule is effective on September 6, 2011.

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2010-0158. All documents in the docket are listed in the <http://regulations.gov> Web site. Although listed in the electronic docket, some information is not publicly

available, *i.e.*, confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://regulations.gov> or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources and Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

**FOR FURTHER INFORMATION CONTACT:** Ellen Wentworth, (215) 814-2034, or by e-mail at [wentworth.ellen@epa.gov](mailto:wentworth.ellen@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document, whenever

“we,” “us,” or “our” is used, we mean EPA.

## I. Background

On June 3, 2010 (75 FR 31340), EPA published a notice of proposed rulemaking (NPR) for the State of Delaware. The NPR proposed approval of Delaware's submittals that provide the basic program elements specified in the CAA sections 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M), or portions thereof, necessary to implement, maintain, and enforce the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS and the 2006 PM<sub>2.5</sub> NAAQS. The formal submittals submitted by the State of Delaware on December 13, 2007, September 19, 2008, and September 16, 2009 addressed the section 110(a)(2) requirements for the 1997 8-hour ozone NAAQS; the submittals dated December 13, 2007, March 12, 2008, September 16, 2009, and March 10, 2010 addressed the section 110(a)(2) requirements for the 1997 PM<sub>2.5</sub> NAAQS; and the submittals dated September 16, 2009 and March 10, 2010 addressed the section 110(a)(2) requirements for the 2006 PM<sub>2.5</sub> NAAQS.

## II. Scope of Action on Infrastructure Submissions

EPA is currently acting upon State Implementation Plans (SIPs) that address the infrastructure requirements of CAA section 110(a)(1) and (2) for the ozone and PM<sub>2.5</sub> NAAQS for various states across the country. Commenters on EPA's recent proposals for some states raised concerns about EPA statements that it was not addressing certain substantive issues in the context of acting on those infrastructure SIP submissions.<sup>1</sup> Those commenters specifically raised concerns involving provisions in existing SIPs and with EPA's statements in other proposals that it would address two issues separately and not as part of actions on the infrastructure SIP submissions: (i) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction (SSM) at sources, that may be contrary to the CAA and EPA's policies addressing such excess emissions; and (ii) existing provisions related to “director's variance” or “director's discretion” that

purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA. EPA notes that there are two other substantive issues for which EPA likewise stated in other proposals that it would address the issues separately: (i) Existing provisions for minor source new source review programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs (“minor source NSR”) and (ii) existing provisions for Prevention of Significant Deterioration programs that may be inconsistent with current requirements of EPA's “Final NSR Improvement Rule,” (67 FR 80186, December 31, 2002), as amended by the NSR Reform Rule (72 FR 32526, June 13, 2007) (NSR Reform). In light of the comments, EPA now believes that its statements in various proposed actions on infrastructure SIPs with respect to these four individual issues should be explained in greater depth.

EPA intended the statements in the other proposals concerning these four issues merely to be informational and to provide general notice of the potential existence of provisions within the existing SIPs of some states that might require future corrective action. EPA did not want states, regulated entities, or members of the public to be under the misconception that EPA's approval of the infrastructure SIP submission of a given state should be interpreted as a reapproval of certain types of provisions that might exist buried in the larger existing SIP for such state. Thus, for example, EPA explicitly noted that we believe that some states may have existing SIP approved SSM provisions that are contrary to the CAA and EPA policy, but that “in this rulemaking, EPA is not proposing to approve or disapprove any existing State provisions with regard to excess emissions during SSM of operations at facilities.” EPA further explained, for informational purposes, that “EPA plans to address such State regulations in the future.” EPA made similar statements, for similar reasons, with respect to the director's discretion, minor source NSR, and NSR Reform issues. EPA's objective was to make clear that approval of an infrastructure SIP for these ozone and PM<sub>2.5</sub> NAAQS should not be construed as explicit or implicit reapproval of any existing provisions that relate to these four substantive issues.

Unfortunately, the commenters and others evidently interpreted these statements to mean that EPA considered action upon the SSM provisions and the other three substantive issues to be

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

The requirement for the SIP submissions at issue arises out of CAA section 110(a)(1). That provision requires that states must make a SIP submission “within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)” and that these SIPs are to provide for the “implementation, maintenance, and enforcement” of such NAAQS. Section 110(a)(2) includes a list of specific elements that “[e]ach such plan” submission must meet. EPA has historically referred to these particular submissions that states must make after the promulgation of a new or revised NAAQS as “infrastructure SIPs.” This specific term does not appear in the statute, but EPA uses the term to distinguish this particular type of SIP submission designed to address basic structural requirements of a SIP from other types of SIP submissions designed to address other different requirements, such as “nonattainment SIP” submissions required to address the nonattainment planning requirements of part D, “regional haze SIP” submissions required to address the visibility protection requirements of CAA section 169A, new source review permitting program submissions required to

<sup>1</sup> See, Comments of Midwest Environmental Defense Center, dated May 31, 2011. Docket #EPA-R05-OAR-2007-1179 (adverse comments on proposals for three states in Region 5). EPA notes that these public comments on another proposal are not relevant to this rulemaking and do not have to be directly addressed in this rulemaking. EPA will respond to these comments in the appropriate rulemaking action to which they apply. EPA did receive specific adverse comments in this action that are discussed in more detail in section IV.

address the requirements of part D, and a host of other specific types of SIP submissions that address other specific matters.

Although section 110(a)(1) addresses the timing and general requirements for these infrastructure SIPs and section 110(a)(2) provides more details concerning the required contents of these infrastructure SIPs, EPA believes that many of the specific statutory provisions are facially ambiguous. In particular, the list of required elements provided in section 110(a)(2) contains a wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive provisions, and some of which pertain to requirements for both authority and substantive provisions.<sup>2</sup> Some of the elements of section 110(a)(2) are relatively straightforward, but others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS.<sup>3</sup>

Notwithstanding that section 110(a)(2) states that “each” SIP submission must meet the list of requirements therein, EPA has long noted that this literal reading of the statute is internally inconsistent, insofar as section 110(a)(2)(f) pertains to nonattainment SIP requirements that could not be met on the schedule provided for these SIP submissions in section 110(a)(1).<sup>4</sup> This illustrates that EPA must determine which provisions of section 110(a)(2) may be applicable for a given infrastructure SIP submission. Similarly, EPA has previously decided that it could take action on different parts of the larger, general

“infrastructure SIP” for a given NAAQS without concurrent action on all subsections, such as section 110(a)(2)(D)(i), because EPA bifurcated the action on these latter “interstate transport” provisions within section 110(a)(2) and worked with states to address each of the four prongs of section 110(a)(2)(D)(i) with substantive administrative actions proceeding on different tracks with different schedules.<sup>5</sup> This illustrates that EPA may conclude that subdividing the applicable requirements of section 110(a)(2) into separate SIP actions may sometimes be appropriate for a given NAAQS where a specific substantive action is necessitated, beyond a mere submission addressing basic structural aspects of the state’s SIP. Finally, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS and the attendant infrastructure SIP submission for that NAAQS. For example, the monitoring requirements that might be necessary for purposes of section 110(a)(2)(B) for one NAAQS could be very different than what might be necessary for a different pollutant. Thus, the content of an infrastructure SIP submission to meet this element from a state might be very different for an entirely new NAAQS, versus a minor revision to an existing NAAQS.<sup>6</sup>

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

episodes, as such requirements would not be limited to nonattainment areas. As this example illustrates, each type of SIP submission may implicate some subsections of section 110(a)(2) and not others.

Given the potential for ambiguity of the statutory language of section 110(a)(1) and (2), EPA believes that it is appropriate for EPA to interpret that language in the context of acting on the infrastructure SIPs for a given NAAQS. Because of the inherent ambiguity of the list of requirements in section 110(a)(2), EPA has adopted an approach in which it reviews infrastructure SIPs against this list of elements “as applicable.” In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the purpose of the submission or the NAAQS in question, would meet each of the requirements, or meet each of them in the same way. EPA elected to use guidance to make recommendations for infrastructure SIPs for these NAAQS.

On October 2, 2007, EPA issued guidance making recommendations for the infrastructure SIP submissions for both the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS.<sup>7</sup> Within this guidance document, EPA described the duty of states to make these submissions to meet what EPA characterized as the “infrastructure” elements for SIPs, which it further described as the “basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards.”<sup>8</sup> As further identification of these basic structural SIP requirements, “attachment A” to the guidance document included a short description of the various elements of section 110(a)(2) and additional information about the types of issues that EPA considered germane in the context of such infrastructure SIPs. EPA emphasized that the description of the basic requirements listed on attachment A was not intended “to constitute an interpretation of” the requirements and was merely a “brief description of the required elements.”<sup>9</sup> EPA also stated its belief that with one exception, these requirements were “relatively self explanatory, and past experience with SIPs for other NAAQS should enable states to meet these requirements with

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

<sup>3</sup> For example, section 110(a)(2)(D)(i) requires EPA to be sure that each state’s SIP contains adequate provisions to prevent significant contribution to nonattainment of the NAAQS in other states. This provision contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution. See, *e.g.*, “Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call; Final Rule,” (70 FR 25162, May 12, 2005) (defining, among other things, the phrase “contribute significantly to nonattainment”).

<sup>4</sup> See, *e.g.*, *Id.*, (70 FR 25162, at 63–65, May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(f)).

<sup>5</sup> EPA issued separate guidance to states with respect to SIP submissions to meet section 110(a)(2)(D)(i) for the 1997 ozone and 1997 PM<sub>2.5</sub> NAAQS. See, “Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards,” from William T. Harnett, Director Air Quality Policy Division OAQPS, to Regional Air Division Director, Regions I–X, dated August 15, 2006.

<sup>6</sup> For example, implementation of the 1997 PM<sub>2.5</sub> NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

<sup>7</sup> See, “Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards,” from William T. Harnett, Director Air Quality Policy Division, to Air Division Directors, Regions I–X, dated October 2, 2007 (the “2007 Guidance”).

<sup>8</sup> *Id.*, at page 2.

<sup>9</sup> *Id.*, at attachment A, page 1.

assistance from EPA Regions.”<sup>10</sup> For the one exception to that general assumption, however, *i.e.*, how states should proceed with respect to the requirements of section 110(a)(2)(G) for the 1997 PM<sub>2.5</sub> NAAQS, EPA gave much more specific recommendations. But for other infrastructure SIP submittals, and for certain elements of the submittals for the 1997 PM<sub>2.5</sub> NAAQS, EPA assumed that each state would work with its corresponding EPA regional office to refine the scope of a state’s submittal based on an assessment of how the requirements of section 110(a)(2) should reasonably apply to the basic structure of the state’s SIP for the NAAQS in question.

On September 25, 2009, EPA issued guidance to make recommendations to states with respect to the infrastructure SIPs for the 2006 PM<sub>2.5</sub> NAAQS.<sup>11</sup> In the 2009 Guidance, EPA addressed a number of additional issues that were not germane to the infrastructure SIPs for the 1997 8-hour ozone and 1997 PM<sub>2.5</sub> NAAQS, but were germane to these SIP submissions for the 2006 PM<sub>2.5</sub> NAAQS, *e.g.*, the requirements of section 110(a)(2)(D)(i) that EPA had bifurcated from the other infrastructure elements for those specific 1997 ozone and PM<sub>2.5</sub> NAAQS.

Significantly, neither the 2007 Guidance nor the 2009 Guidance explicitly referred to the SSM, director’s discretion, minor source NSR, or NSR Reform issues as among specific substantive issues EPA expected states to address in the context of the infrastructure SIPs, nor did EPA give any more specific recommendations with respect to how states might address such issues even if they elected to do so. The SSM and director’s discretion issues implicate section 110(a)(2)(A), and the minor source NSR and NSR Reform issues implicate section 110(a)(2)(C). In the 2007 Guidance, however, EPA did not indicate to states that it intended to interpret these provisions as requiring a substantive submission to address these specific issues in the context of the infrastructure SIPs for these NAAQS.

<sup>10</sup> *Id.*, at page 4. In retrospect, the concerns raised by commenters with respect to EPA’s approach to some substantive issues indicates that the statute is not so “self explanatory,” and indeed is sufficiently ambiguous that EPA needs to interpret it in order to explain why these substantive issues do not need to be addressed in the context of infrastructure SIPs and may be addressed at other times and by other means.

<sup>11</sup> See, “Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle (PM<sub>2.5</sub>) National Ambient Air Quality Standards (NAAQS),” from William T. Harnett, Director Air Quality Policy Division, to Regional Air Division Directors, Regions I–X, dated September 25, 2009 (the “2009 Guidance”).

Instead, EPA’s 2007 Guidance merely indicated its belief that the states should make submissions in which they established that they have the basic SIP structure necessary to implement, maintain, and enforce the NAAQS. EPA believes that states can establish that they have the basic SIP structure, notwithstanding that there may be potential deficiencies within the existing SIP. Thus, EPA’s other proposals mentioned these issues not because EPA considers them issues that must be addressed in the context of an infrastructure SIP as required by section 110(a)(1) and (2), but rather because EPA wanted to be clear that it considers these potential existing SIP problems as separate from the pending infrastructure SIP actions.

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

Finally, EPA believes that its approach is a reasonable reading of section 110(a)(1) and (2) because the statute provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow EPA to take appropriate tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a “SIP

call” whenever EPA determines that a state’s SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or otherwise to comply with the CAA.<sup>12</sup> Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.<sup>13</sup> Significantly, EPA’s determination that an action on the infrastructure SIP is not the appropriate time and place to address all potential existing SIP problems does not preclude EPA’s subsequent reliance on provisions in section 110(a)(2) as part of the basis for action at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director’s discretion provisions in the course of acting on the infrastructure SIP, EPA believes that section 110(a)(2)(A) may be among the statutory bases that EPA cites in the course of addressing the issue in a subsequent action.<sup>14</sup>

EPA’s proposed approval of the infrastructure SIP submissions from Delaware predated the actions on the submissions of other states and thus occurred before EPA decided to provide the informational statements concerning the SSM, director’s discretion, minor source NSR, and NSR Reform issues as specific substantive issues that EPA was not addressing in this context. However, EPA determined that these four issues should be addressed, as appropriate, separately from the action on the infrastructure SIPs for this state for the same reasons. Given this determination, EPA did not address these substantive issues in the prior proposals. Accordingly, EPA emphasizes that

<sup>12</sup> EPA has recently issued a SIP call to rectify a specific SIP deficiency related to the SSM issue. See, “Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,” (74 FR 21639, April 18, 2011).

<sup>13</sup> EPA has recently utilized this authority to correct errors in past actions on SIP submissions related to PSD programs. See, “Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule,” (75 FR 82536, Dec. 30, 2010). EPA has previously used its authority under CAA 110(k)(6) to remove numerous other SIP provisions that EPA 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).

<sup>14</sup> EPA has recently disapproved a SIP submission from Colorado on the grounds that it would have included a director’s discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, *e.g.*, (75 FR 42342–42344, July 21, 2010) (proposed disapproval of director’s discretion provisions); (76 FR 4540, Jan. 26, 2011) (final disapproval of such provisions).

today's action should not be construed as a reapproval of any potential problematic provisions related to these substantive issues that may be buried within the existing SIP of this state. To the extent that there is any such existing problematic provision that EPA determines should be addressed, EPA plans to address such provisions in the future. In the meantime, EPA encourages any state that may have a deficient provision related to these issues to take steps to correct it as soon as possible.

### III. Summary of Relevant Submissions

The submittals referenced in the Background section above address the infrastructure elements specified in the CAA section 110(a)(2). These submittals refer to the implementation, maintenance and enforcement of the 1997 8-hour ozone, the 1997 PM<sub>2.5</sub> NAAQS, and the 2006 PM<sub>2.5</sub> NAAQS. The rationale supporting EPA's proposed action is explained in the NPR and the technical support document (TSD) and will not be restated here. On July 6, 2010, EPA received adverse comments on the June 3, 2010 NPR. A summary of the comments submitted and EPA's responses are provided in Section IV of this document. EPA is also revising the portion of the TSD relating to section 110(a)(2)(D)(ii) in order to provide a more accurate and detailed explanation of the rationale supporting EPA's approval. The TSD is available on line at <http://regulations.gov>, Docket number EPA-R03-OAR-2010-0158.

### IV. Summary of Public Comments and EPA Responses

*Comment:* The commenter objected to EPA's proposed approval of the infrastructure SIP submission on the grounds that the existing Delaware SIP contain provisions addressing excess emissions during periods of SSM, that do not meet the requirements of the CAA. The commenter argued that even though the SIP revisions that EPA proposed to approve in this action did not contain the provisions to which the commenter objects, the presence of existing SSM provisions in Delaware's SIP that are contrary to the CAA compromise the State's ability to ensure compliance with the PM<sub>2.5</sub> and ozone NAAQS. The commenter provided details on specific regulatory provisions that the commenter characterized as inconsistent with Federal law. According to the commenter, these provisions "potentially create blanket exemptions" for emissions during SSM events and these exemptions enable sources to emit excessive amounts of pollutants that could "compromise the

state's ability to achieve and maintain the PM<sub>2.5</sub> and ozone NAAQS."

*Response:* EPA disagrees with the commenter's view that if a state's existing SIP contains any arguably illegal existing SSM provision, then EPA cannot approve the infrastructure SIP submission of that state. As discussed in more detail in section II of this final rulemaking, EPA does not agree that an action upon the infrastructure SIP required by section 110(a)(1) and (2) requires that EPA address any existing SSM provisions.

EPA shares the commenter's concerns that certain existing SSM provisions may be contrary to the CAA and existing EPA guidance, and that such provisions can have an adverse impact on air quality control efforts in a given state. EPA plans to address such provisions in the future, as appropriate, and in the meantime encourages any state having a deficient SSM provision to take steps to correct it as soon as possible. EPA is not evaluating the merits of the commenter's claims with respect to the particular provisions identified in the comments in this action because EPA considers these to be beyond the scope of this action.

*Comment:* The commenter also objected to EPA's proposed approval of the infrastructure SIP submission because of existing provisions of the Delaware SIP that pertain to NO<sub>x</sub> emission from certain stationary sources. According to the commenter, these provisions enable the state to allow sources to avoid otherwise applicable NO<sub>x</sub> emissions limits during SSM events. Moreover, the commenter objected to the provisions on the grounds that they allegedly allow the state to make such revisions to the NO<sub>x</sub> limits "outside the SIP-revision process," thereby precluding EPA from ensuring that such revisions would meet EPA's applicable guidance on provisions related to SSM. Thus, according to the commenter, the existing provisions combine an impermissible director's discretion provision with an impermissible SSM provision, and these director's discretion and variance provisions are contrary to the CAA.

*Response:* EPA also disagrees with the commenter's conclusion that if a state's existing SIP contains any arguably illegal director's discretion or director's variance provision in combination with an arguably illegal SSM provision, then EPA cannot approve the infrastructure SIP submission of that state. As discussed in more detail in section II of this final rulemaking, EPA does not agree that an action upon the infrastructure SIP required by section

110(a)(1) and (2) requires that EPA address any existing director's discretion provisions, or such provisions in combination with existing SSM provisions.

EPA shares the commenter's concerns that certain existing director's discretion provisions in combination with existing SSM provisions may be contrary to the CAA and existing EPA guidance and that such provisions can have an adverse impact on air quality control efforts in a given state. EPA plans to take action in the future to address such provisions, as appropriate, and in the meantime encourages any state having a deficient director's discretion or director's variance provision to take steps to correct it as soon as possible. EPA is not evaluating the merits of the commenter's claims with respect to the particular provisions identified in the comments in this action because EPA considers these to be beyond the scope of this action.

*Comment:* The commenter asserted that Delaware's New Source Performance Standards (NSPS) regulations are not SIP approved but nevertheless contain "loopholes" for emissions during periods of startup, shutdown, and/or malfunction that are less stringent than, or inconsistent with, federal law. The commenter provided details on specific regulatory provisions that the commenter characterized as inconsistent with federal law. The commenter acknowledged that these specific provisions are not SIP approved, but argued that the provisions affect the ability to enforce emissions limits in state court or administrative proceedings and therefore potentially undermine the CAA and EPA's ability to ensure implementation of the CAA.

*Response:* EPA disagrees with these comments. First, as the commenter agrees, provisions of state law that are not SIP approved are by definition not something that is relevant to EPA's action on the specific infrastructure SIP under consideration in this action. EPA's review of the infrastructure SIP is to evaluate the basic structural components of the SIP to assure that it meets basic requirements for implementation, maintenance, and enforcement of the NAAQS. Provisions of state law that are not within the SIP are outside the scope of this action, even if they related to an issue that was otherwise germane to this action.

Second, as explained in response to commenters other concerns with provisions that are within the SIP, EPA does not agree that an action upon an infrastructure SIP submission required by section 110(a)(1) and (2) requires that EPA address any existing SSM

provisions. The bases for EPA's view that such provisions should be addressed separately is explained in more detail in section II of this final rulemaking.

## V. Final Action

EPA is approving the State of Delaware's submittals that provide the basic program elements specified in the CAA sections 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M), or portions thereof, necessary to implement, maintain, and enforce the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS and the 2006 PM<sub>2.5</sub> NAAQS. EPA made completeness findings for the 1997 8-hour ozone NAAQS on March 27, 2008 (73 FR 16205) and on October 22, 2008 (73 FR 62902) for the 1997 PM<sub>2.5</sub> NAAQS. These findings pertained only to whether the submissions were complete, pursuant to 110(k)(1)(A), and did not constitute EPA approval or disapproval of such submissions. The March 27, 2008 finding noted that Delaware failed to submit a complete SIP addressing the portions of (C) and (J) relating to the Part C permit program for the 1997 8-hour ozone NAAQS. Specifically, EPA found that Delaware failed to address sections 110(a)(2)(C) and (J) pertaining to changes to its Part C PSD permit program required by the November 29, 2005 (70 FR 71612, page 71699) final rule that made nitrogen oxides (NO<sub>x</sub>) a precursor for ozone in the Part C regulations found at 40 CFR 51.166 and in 40 CFR 52.21. EPA has taken separate action on the portions of section 110(a)(2)(C) and (J) for the 1997 8-hour ozone NAAQS as they relate to Delaware's PSD permit program (76 FR 26679).

Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather are due at the time the nonattainment area plan requirements are due pursuant to section 172. These elements are: (i) Submissions required by section 110(a)(2)(C) to the extent that subsection pertains to a permit program in Part D Title I of the CAA; and (ii) any submissions required by section 110(a)(2)(I), which pertain to the nonattainment planning requirements of Part D Title I of the CAA. This action does not cover these specific elements. This action also does not address the requirements of 110(a)(2)(D)(i) for the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS or for the 2006 PM<sub>2.5</sub> NAAQS. A portion of these requirements have been addressed

by separate findings issued by EPA (See (70 FR 21147, April 25, 2005); (75 FR 32673, June 9, 2010), and (76 FR 2853, January 18, 2011)). A portion of these requirements are addressed through 110(a)(2) SIP submittals, which EPA will be addressing through separate action.

## VI. Statutory and Executive Order Reviews

### A. General Requirements

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 action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

### B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

### C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 3, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action pertaining to Delaware's section 110(a)(2) infrastructure requirements for the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS, and the 2006 PM<sub>2.5</sub> NAAQS, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: July 22, 2011.

**W.C. Early,**  
Acting, Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

**PART 52—[AMENDED]**

■ 1. The authority citation for part 52 continues to read as follows:

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

**Subpart I—Delaware**

■ 2. In § 52.420, the table in paragraph (e) is amended by adding entries at the end of the table for Delaware's section 110(a)(2) Infrastructure Requirements for the 1997 8-Hour Ozone NAAQS, Section 110(a)(2) Infrastructure Requirements for the 1997 PM<sub>2.5</sub>

NAAQS, and Section 110(a)(2) Infrastructure Requirements for the 2006 PM<sub>2.5</sub> NAAQS. The amendments read as follows:

**§ 52.420 Identification of plan.**

\* \* \* \* \*

(e) \* \* \*

| Name of non-regulatory SIP revision                                                 | Applicable geographic or nonattainment area | State submittal date                      | EPA approval date                                                             | Additional explanation                                                                                                                              |
|-------------------------------------------------------------------------------------|---------------------------------------------|-------------------------------------------|-------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------|
| * * *                                                                               | * * *                                       | * * *                                     | * * *                                                                         | * * *                                                                                                                                               |
| Section 110(a)(2) Infrastructure Requirements for the 1997 8-Hour Ozone NAAQS.      | Statewide .....                             | 12/13/07<br>9/19/08<br>9/16/09            | 8/4/11 [Insert <b>Federal Register</b> page number where the document begins] | This action address the following CAA elements: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M) or portions thereof.    |
| Section 110(a)(2) Infrastructure Requirements for the 1997 PM <sub>2.5</sub> NAAQS. | Statewide .....                             | 12/13/07<br>3/12/08<br>9/16/09<br>3/10/10 | 8/4/11 [Insert <b>Federal Register</b> page number where the document begins] | This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M) or portions thereof.  |
| Infrastructure Requirements for the 2006 PM <sub>2.5</sub> NAAQS.                   | Statewide .....                             | 9/16/09<br>3/10/10                        | 8/4/11 [Insert <b>Federal Register</b> page number where the document begins] | This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M), or portions thereof. |

[FR Doc. 2011-19694 Filed 8-3-11; 8:45 am]

**BILLING CODE** 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R09-OAR-2011-0462; FRL-9437-6]

#### Revision to the California State Implementation Plan; South Coast Air Quality Management District

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

**ACTION:** Direct final rule.

**SUMMARY:** EPA is taking direct final action to approve a revision to the South Coast Air Quality Management District portion of the California State Implementation Plan (SIP). This revision concerns volatile organic compound (VOC) emissions from polymeric foam manufacturing operations. We are approving a local rule that regulates these emission sources under the Clean Air Act as amended in 1990 (CAA).

**DATES:** This rule is effective on October 3, 2011 without further notice, unless EPA receives adverse comments by September 6, 2011. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

**ADDRESSES:** Submit comments, identified by docket number EPA-R09-OAR-2011-0462, by one of the following methods:

1. *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions.

2. E-mail: [steckel.andrew@epa.gov](mailto:steckel.andrew@epa.gov).

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901.

**Instructions:** All comments will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through <http://www.regulations.gov> or e-mail. <http://www.regulations.gov> is an “anonymous access” system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid

the use of special characters, any form of encryption, and be free of any defects or viruses.

**Docket:** Generally, documents in the docket for this action are available electronically at <http://www.regulations.gov> and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at <http://www.regulations.gov>, some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section. **FOR FURTHER INFORMATION CONTACT:** Mae Wang, EPA Region IX, (415) 947-4124, [wang.mae@epa.gov](mailto:wang.mae@epa.gov).

#### SUPPLEMENTARY INFORMATION:

Throughout this document, “we,” “us,” and “our” refer to EPA.

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