



**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R08-OAR-2010-0300; FRL-9715-1]**

**Approval and Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards; North Dakota**

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

**ACTION:** Final rule.

**SUMMARY:** EPA is in part approving and in part conditionally approving two State Implementation Plan (SIP) submissions made by the State of North Dakota. The SIP submissions demonstrate that North Dakota's SIP meets the requirements of section 110(a)(1) and (2) of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for ozone on July 18, 1997. Section 110(a)(1) of the CAA requires that each state, after a new or revised NAAQS is promulgated, review their SIPs to ensure that they meet the requirements of the "infrastructure elements" of section 110(a)(2). The State of North Dakota submitted revisions to their Infrastructure SIP for the 1997 ozone NAAQS, dated April 6, 2009, as well as a certification of the adequacy of their infrastructure SIP for the 1997 ozone NAAQS, dated November 23, 2009. This action is

being taken under section 110 of the Clean Air Act.

**EFFECTIVE DATE:** This final rule is effective [insert date 30 days after publication in the Federal Register].

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2010-0300. All documents in the docket are listed on the www.regulations.gov website. Although listed in the index, some information is not publicly available, e.g., 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 www.regulations.gov or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. 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:** Kathy Ayala, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mail Code 8P-

AR, 1595 Wynkoop Street, Denver, Colorado, 80202-1129, 303-312-6142, [ayala.kathy@epa.gov](mailto:ayala.kathy@epa.gov).

**SUPPLEMENTARY INFORMATION:**

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**Definitions**

For the purpose of this document, we are giving meaning to certain words or initials as follows:

- (i) The words or initials Act or CAA mean or refer to the Clean Air Act, unless the context indicates otherwise.
- (ii) The initials DAQ mean or refer to Division of Air Quality.
- (iii) The words EPA, we, us or our mean or refer to the United States Environmental Protection Agency.
- (iv) The initials GHGs mean or refer to greenhouse gases.
- (v) The initials NAAQS mean or refer to national ambient air quality standards.
- (vi) The initials NDAC mean or refer to North Dakota Administrative Code.

- (vii) The initials NDCC mean or refer to North Dakota Century Code.
- (viii) The initials NO<sub>x</sub> mean or refer to nitrogen oxides.
- (ix) The initials NSR mean or refer to new source review.
- (x) The initials PM<sub>2.5</sub> mean or refer to particulate matter with an aerodynamic diameter of less than 2.5 micrometers (fine particulate matter).
- (xi) The initials ppm mean or refer to parts per million.
- (xii) The initials PSD mean or refer to Prevention of Significant Deterioration.
- (xiii) The initials SIP mean or refer to State Implementation Plan.
- (xiv) The initials SSM mean or refer to start-up, shutdown, or malfunction.

## **I. Background for This Action**

On July 18, 1997, EPA promulgated new NAAQS for ozone based on 8-hour average concentrations. The 8-hour averaging period replaced the previous 1-hour averaging period, and the level of the NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38856). By statute, 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 standard.

Section 110(a)(2) provides basic requirements for SIPs, including emissions inventories, monitoring, and modeling, to assure attainment and maintenance of the standards. These requirements are set out in several "infrastructure elements," listed in section 110(a)(2).

Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, and the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time a state develops and submits its SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions a state's existing SIP already contains. In the case of the 1997 ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous NAAQS. In a guidance issued on October 2, 2007, EPA noted that, to the extent an existing SIP already meets the section 110(a)(2) requirements, states need only to certify that fact via a letter to EPA.<sup>1</sup> North Dakota submitted revisions to its SIP on April 6,

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<sup>1</sup> Memorandum from William T. Harnett, Director, Air Quality Policy Division, "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the

2009, which are being approved and are included in the state's infrastructure checklist and certification, dated November 23, 2009, that its infrastructure SIP requirements are met for the 1997 ozone NAAQS.

On April 16, 2012 EPA published a notice of proposed rulemaking (NPR) for the State of North Dakota. The NPR proposed approval of elements (A), (B), (C), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J), (K), (L), and (M) and conditional approval of element 110(a)(2)(E)(ii). In the NPR, we discussed our reasons for our proposed approval and conditional approval. We are completing our proposed action for the reasons given in the NPR. However, we find it appropriate to further explain our conditional approval for element 110(a)(2)(E)(ii).

In the NPR, we noted the link between element 110(a)(2)(E)(ii) and section 128 of the CAA. We then presented three considerations for implementing section 128 and applied these considerations to North Dakota's situation. We concluded that North Dakota, as a state without a board or body that approves permits or enforcement orders under the Act, was not subject to the requirements of section 128(a)(1), and was obliged to submit a SIP revision to meet the requirements of

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1997 8-hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards" (Oct. 2, 2007).

section 128(a)(2). We briefly described procedures that North Dakota has committed to submit as a SIP revision, procedures which were detailed in North Dakota's commitment letter in the docket, and we then briefly stated that, due to a requirement for recusal, the procedures were more stringent than the minimum requirements of 128(a)(2). As a result, we proposed conditional approval of North Dakota's infrastructure SIP for element 110(a)(2)(E)(ii) for the 1997 ozone NAAQS.

In this notice, EPA completes that conditional approval, and finds it appropriate to further explain how the elements of North Dakota's procedures satisfy the requirement for adequate disclosure of potential conflicts of interest. This explanation is not intended to imply that any other, different approaches would or would not meet the requirements of section 128(a)(2). Thus, EPA corrects our statements in the proposal to the extent they imply that North Dakota's procedures necessarily exceed the minimum requirements of section 128(a)(2), but we do not change the conclusion that the procedures meet these requirements.

Turning to our explanation, we first note that the set of persons to which the SIP revision will apply is adequate. As explained in our proposal, in a situation such as North Dakota's, in which there is no board or body that approves

permits or enforcement orders under the Act, section 128(a)(2) then applies to the "head of an executive agency with similar powers," that is, the head of an executive agency that approves permits or enforcement orders under the Act. As further explained in our proposal, this requirement should extend to any lower officer of an executive agency who is delegated authority by the head of the executive agency to approve permits or enforcement orders, or who is directly vested with this authority by statute. North Dakota has committed to, in its SIP revision, making the procedures applicable to any person in the State agency who approves permits or enforcement actions under North Dakota's implementation of the Act. This is sufficiently broad to include such lower officers.

Second, the North Dakota procedures address an adequately broad set of potential conflicts of interest. Under the procedures, a conflict of interest is defined as the conflict between the duties of the person subject to the procedure and the self-interest or other interests of the person. The procedures additionally state that persons subject to it must avoid any interest, influence, or relationship that might conflict or appear to conflict with the best interests of the state agency or the state, or that might affect the person's

working judgment or loyalty. Because the procedures are not limited to the self-interest of the person but also include other interests, influences, and relationships, they extend beyond the minimum case where the person's own financial interest would create a conflict. In addition, because the procedures apply to interests, influences, and relationships that might appear to create a conflict or might affect the person's working judgment or loyalty, they are not dependent on a subjective standard as to whether a particular individual would actually have their working judgment or loyalty affected.

Third, the mechanics of the North Dakota procedures are adequate. The disclosure must be in writing and identify the potential conflict and its cause. The disclosure must be provided to a superior, and the person subject to the conflict must remove themselves from any negotiations, deliberations, or decisions involving the conflict. Thus, the conflict is adequately memorialized, an appropriate party is made aware of the conflict and a resolution of the conflict (e.g., recusal) is reached.

Finally, the purpose of the North Dakota procedures adequately relates to the purpose of section 128 as a whole. The overall purpose of section 128 appears to be that final

decisions on permits or enforcement orders are not unduly influenced. However, as explained above, section 128(a)(1) does not apply in North Dakota's case. In such a case, it is reasonable for the state, as an alternative approach to meet the overall purpose of section 128 (and not the particular requirements of section 128(a)(1)), to require recusal in addition to disclosure. EPA therefore concludes that the SIP revision that North Dakota has committed to submit meets the requirements of section 128(a)(2) and that the North Dakota infrastructure SIP for the 1997 ozone NAAQS should be conditionally approved for section 110(a)(2)(E)(ii).

In this action, EPA also completes our proposed approval of portions of North Dakota's April 6, 2009 SIP submission. Specifically, EPA approves into the North Dakota SIP revisions sections 6.8, 6.11.3, and chapter 9, Air Pollution Control Rules of the State of North Dakota, and the addition of sections 1.14 and 7.7 to the Air Pollution Control Rules of the State of North Dakota.

## **II. Response to Comments**

EPA did not receive comments regarding our proposed rule for action on North Dakota's SIP submittals.

## **III. Final Action**

In this action, EPA is approving in full the following section 110(a)(2) infrastructure elements for North Dakota for the 1997 ozone NAAQS: (A), (B), (C), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J), (K), (L), and (M).

In this action, EPA is conditionally approving section 110(a)(2)(E)(ii) for the 1997 ozone NAAQS and will fully approve this element if North Dakota takes the action detailed in the State's March 8, 2012 commitment letter, including submission of a SIP revision as described within the commitment letter, within one year after the publication date of this final action. If, however, North Dakota does not submit the SIP revisions specified in its commitment letter within one year after the publication date of this final action, EPA's conditional approval will automatically revert to disapproval of the infrastructure SIP for section 110(a)(2)(E)(ii) for the 1997 ozone NAAQS.

In this action, EPA also approves into the North Dakota SIP revisions to sections 6.8 (Annual Network Review), 6.11.3 (Air Quality Surveillance: Ozone), and chapter 9 (Resources), Air Pollution Control Rules of the State of North Dakota, and the addition of sections 1.14 (Revisions to the Implementation Plan), and 7.7 (Air Quality Modeling) to the Air Pollution

Control Rules of the State of North Dakota.

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

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 USC 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it 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).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian

tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it approves a state rule implementing a Federal standard.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for

failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission; to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 USC 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 USC 3501 *et seq.*).

The Congressional Review Act, 5 USC section 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 rule 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 USC section 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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 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, Carbon monoxide, Incorporation by Reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: July 31, 2012

James B. Martin  
Regional Administrator  
Region 8

PART 52 [AMENDED]

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

Authority: 42 USC 7401 et seq.

Subpart JJ - North Dakota

2. Section 52.1820 in paragraph (e) is amended by:

- a. Revising table entry "(1)"; and
- b. Adding to the table entries "(26)," "(27)," "(28)," "(29)," and "(30)," in numerical order.

The revisions and additions read as follows:

**§ 52.1820 Identification of plan.**

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(e) \* \* \*

Name of nonregulatory SIP provision	Applicable geographic or non-attainment area	State submitted date/adopted date	EPA approved date and citation <sup>3</sup>	Explanations
(1) Implementation Plan for the Control of Air Pollution	Statewide	Submitted: 1/24/72 ; Adopted :	5/31/72, 37 FR 10842	Excluding subsequent revisions, as follows: Chapters 1, 6, 7, 9, 11, and 12; Sections 1.14, 2.11, 3.7, 6.8, 6.10, 6.11,

<p>for the State of North Dakota.</p> <p>Chapters:</p> <ol style="list-style-type: none"> <li>1. Introduction.</li> <li>2. Legal Authority.</li> <li>3. Control Strategy.</li> <li>4. Compliance Schedule.</li> <li>5. Prevention of Air Pollution Emergency Episodes.</li> <li>6. Air Quality Surveillance.</li> <li>7. Review of New Sources and Modifications.</li> <li>8. Source Surveillance.</li> <li>9. Resources.</li> <li>10.</li> </ol>		1/24/72		<p>6.13, 7.7, and 8.3; and Subsections 3.2.1, 5.2.1, 6.11.3, 7.8.1.A, 7.8.1.B, 7.8.1.C, and 8.3.1. Revisions to these non-regulatory provisions have subsequently been approved. See below.</p>
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<p>Intergovernmental Cooperation</p> <p>· 11. Rules and Regulations ·</p> <p>With subsequent revisions to the chapters as follows:</p>				
* * * * *				
<p>(26) Revisions to SIP Chapter 6, Section 6.8, Annual Network Review</p>	<p>Statewide</p>	<p>Submitted: 4/6/09; Adopted: 4/1/09</p>	<p>[INSERT DATE OF PUBLICATION], [INSERT FR CITATION]</p>	
<p>(27) Revisions to SIP Chapter 6, Section 6.11.3, Air Quality Surveillance: Ozone</p>	<p>Statewide</p>	<p>Submitted: 4/6/09; Adopted: 4/1/09</p>	<p>[INSERT DATE OF PUBLICATION], [INSERT FR CITATION]</p>	
<p>(28) Revisions to SIP Chapter 9, Resources</p>	<p>Statewide</p>	<p>Submitted: 4/6/09; Adopted: 4/1/09</p>	<p>[INSERT DATE OF PUBLICATION], [INSERT FR CITATION]</p>	
<p>(29) Revisions to SIP</p>	<p>Statewide</p>	<p>Submitted: 4/6/09;</p>	<p>[INSERT DATE OF PUBLICATION]</p>	

Chapter 1, Section 1.14, Revisions to the Implementation Plan		Adopted : 4/1/09	], [INSERT FR CITATION]	
(30) Revisions to SIP Chapter 7, Section 7.7, Air Quality Modeling	Statewide	Submitted: 4/6/09; Adopted : 4/1/09	[INSERT DATE OF PUBLICATION ], [INSERT FR CITATION]	

<sup>3</sup> In order to determine the EPA effective date for a specific provision listed in this table, consult the Federal Register notice cited in this column for the particular provision.

3. Section 52.1833 is added to read as follows:

**§ 52.1833 Section 110(a)(2) infrastructure requirements.**

On November 23, 2009, Tom Bachman, Senior Environmental Engineer, North Dakota Department of Health, submitted a completeness criteria checklist which provides the State of North Dakota's SIP provisions which meet the requirements of CAA Section 110(a)(1) and (2). The following elements are approved for the 1997 ozone NAAQS: (A), (B), (C), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J), (K), (L), and (M). The following element is conditionally approved for the 1997 ozone NAAQS: (E)(ii).

[FR Doc. 2012-22771 Filed 09/14/2012 at 8:45 am; Publication

Date: 09/17/2012]