



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R04-OAR-2014-0751; FRL-9946-83-Region 4]

#### Air Plan Approval/Disapproval; Mississippi Infrastructure Requirements for the 2010

#### Nitrogen Dioxide National Ambient Air Quality Standards

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve in part, and disapprove in part, portions of the State Implementation Plan (SIP) submission, submitted by the State of Mississippi, through the Mississippi Department of Environmental Quality (MDEQ) on February 28, 2013, to demonstrate that the State meets the infrastructure requirements of the Clean Air Act (CAA or Act) for the 2010 1-hour nitrogen dioxide (NO<sub>2</sub>) national ambient air quality standards (NAAQS). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance and enforcement of each NAAQS promulgated by the EPA, which is commonly referred to as an “infrastructure” SIP. MDEQ certified that the Mississippi SIP contains provisions that ensure the 2010 NO<sub>2</sub> NAAQS are implemented, enforced, and maintained in Mississippi. With the exception of the state board majority requirements respecting significant portion of income, for which EPA is proposing to disapprove, EPA is proposing to determine that portions of Mississippi’s infrastructure submission, submitted to EPA on February 28, 2013, satisfies certain required infrastructure elements for the 2010 1-hour NO<sub>2</sub> NAAQS.

**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-R04-OAR-2014-0751 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. 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. 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>.

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## **Table of Contents**

### **I. Background**

### **II. What Elements are Required under Sections 110(a)(1) and (2)?**

- III. What is EPA’s Approach to the Review of Infrastructure SIP Submissions?**
- IV. What is EPA’s Analysis of How Mississippi Addressed the Elements of Sections 110(a)(1) and (2) “Infrastructure” Provisions?**
- V. Proposed Action**
- VI. Statutory and Executive Order Reviews**

**I. Background**

On February 9, 2010, EPA promulgated a new 1-hour primary NAAQS for NO<sub>2</sub> at a level of 100 parts per billion (ppb), based on a 3-year average of the 98th percentile of the yearly distribution of 1-hour daily maximum concentrations. *See* 75 FR 6474. Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs for the 2010 NO<sub>2</sub> NAAQS to EPA no later than January 22, 2013.<sup>1</sup>

This action is proposing to approve Mississippi’s infrastructure SIP submission for the applicable requirements of the 2010 1-hour NO<sub>2</sub> NAAQS, with the exception of the preconstruction PSD permitting requirements for major sources of sections 110(a)(2)(C), prong 3

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<sup>1</sup> In these infrastructure SIP submissions States generally certify evidence of compliance with sections 110(a)(1) and (2) of the CAA through a combination of state regulations and statutes, some of which have been incorporated into the federally-approved SIP. In addition, certain federally-approved, non-SIP regulations may also be appropriate for demonstrating compliance with sections 110(a)(1) and (2). Throughout this rulemaking, unless otherwise indicated, the term “Air Pollution Control (APC)” or “Section APC-S-X” indicates that the cited regulation has been approved into Mississippi’s federally-approved SIP. The term “Mississippi Code” indicates cited Mississippi state statutes, which are not a part of the SIP unless otherwise indicated.

of (D)(i) and (J), the interstate transport requirements of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2, and 4), and the state board majority requirements respecting significant portion of income of 110(a)(2)(E)(ii). On March 18, 2015, EPA approved Mississippi's February 28, 2013, infrastructure SIP submission regarding the PSD permitting requirements for major sources of sections 110(a)(2)(C), prong 3 of D(i) and (J) for the 2010 1-hour NO<sub>2</sub> NAAQS. *See* 80 FR 14019. Therefore, EPA is not proposing any action in this document pertaining to sections 110(a)(2)(C), prong 3 of D(i) and (J). Additionally, with respect to the interstate transport requirements of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2, and 4), EPA is not proposing any action in this document on these requirements. With respect to Mississippi's infrastructure SIP submission related to the majority requirements respecting significant portion of income of 110(a)(2)(E)(ii), EPA is proposing to disapprove this portion of Mississippi's submission because Mississippi does not preclude at least a majority of the members of its boards from receiving a significant portion of their income from persons subject to permits or enforcement orders issued by such boards. For the aspects of Mississippi's submittal proposed for approval, EPA notes that the Agency is not approving any specific rule, but rather proposing that Mississippi's already approved SIP meets certain CAA requirements.

## **II. What Elements are Required under Sections 110(a)(1) and (2)?**

Section 110(a) of the CAA requires states to submit SIPs to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the

facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the 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 the state's existing SIP already contains. In the case of the 2010 NO<sub>2</sub> NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous NAAQS.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for “infrastructure” SIP requirements related to a newly established or revised NAAQS. As mentioned previously, these requirements include basic SIP elements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The requirements that are the subject of this proposed rulemaking are summarized later in this preamble and in EPA's September 13, 2013, memorandum entitled “Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2).”<sup>2</sup>

- 110(a)(2)(A): Emission Limits and Other Control Measures
- 110(a)(2)(B): Ambient Air Quality Monitoring/Data System

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<sup>2</sup> 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 due at the time the nonattainment area plan requirements are due pursuant to section 172. These requirements are: (1) submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA; and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. This proposed rulemaking does not address infrastructure elements related to section 110(a)(2)(I) or the nonattainment planning requirements of 110(a)(2)(C).

- 110(a)(2)(C): Programs for Enforcement of Control Measures and for Construction or Modification of Stationary Sources<sup>3</sup>
- 110(a)(2)(D)(i)(I) and (II): Interstate Pollution Transport
- 110(a)(2)(D)(ii): Interstate Pollution Abatement and International Air Pollution
- 110(a)(2)(E): Adequate Resources and Authority, Conflict of Interest, and Oversight of Local Governments and Regional Agencies
- 110(a)(2)(F): Stationary Source Monitoring and Reporting
- 110(a)(2)(G): Emergency Powers
- 110(a)(2)(H): SIP Revisions
- 110(a)(2)(I): Plan Revisions for Nonattainment Areas<sup>4</sup>
- 110(a)(2)(J): Consultation with Government Officials, Public Notification, and PSD and Visibility Protection
- 110(a)(2)(K): Air Quality Modeling and Submission of Modeling Data
- 110(a)(2)(L): Permitting Fees
- 110(a)(2)(M): Consultation and Participation by Affected Local Entities

### **III. What is EPA’s Approach to the Review of Infrastructure SIP Submissions?**

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<sup>3</sup>This rulemaking only addresses requirements for this element as they relate to attainment areas.

<sup>4</sup> As mentioned , this element is not relevant to this proposed rulemaking.

EPA is acting upon the SIP submission from Mississippi that addresses the infrastructure requirements of CAA sections 110(a)(1) and 110(a)(2) for the 2010 NO<sub>2</sub> NAAQS. The requirement for states to make a SIP submission of this type arises out of CAA section 110(a)(1). Pursuant to section 110(a)(1), states must make SIP submissions “within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof),” and these SIP submissions are to provide for the “implementation, maintenance, and enforcement” of such NAAQS. The statute directly imposes on states the duty to make these SIP submissions, and the requirement to make the submissions is not conditioned upon EPA’s taking any action other than promulgating a new or revised NAAQS. Section 110(a)(2) includes a list of specific elements that “[e]ach such plan” submission must address.

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

Section 110(a)(1) addresses the timing and general requirements for infrastructure SIP submissions, and section 110(a)(2) provides more details concerning the required contents of these submissions. The list of required elements provided in section 110(a)(2) contains a wide

variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive program provisions, and some of which pertain to requirements for both authority and substantive program provisions.<sup>5</sup> EPA therefore believes that while the timing requirement in section 110(a)(1) is unambiguous, some of the other statutory provisions are ambiguous. In particular, EPA believes that the list of required elements for infrastructure SIP submissions provided in section 110(a)(2) contains ambiguities concerning what is required for inclusion in an infrastructure SIP submission.

The following examples of ambiguities illustrate the need for EPA to interpret some section 110(a)(1) and section 110(a)(2) requirements with respect to infrastructure SIP submissions for a given new or revised NAAQS. One example of ambiguity is that section 110(a)(2) requires that “each” SIP submission must meet the list of requirements therein, while EPA has long noted that this literal reading of the statute is internally inconsistent and would create a conflict with the nonattainment provisions in part D of title I of the Act, which specifically address nonattainment SIP requirements.<sup>6</sup> Section 110(a)(2)(I) pertains to nonattainment SIP requirements and part D addresses when attainment plan SIP submissions to address nonattainment area requirements are due. For example, section 172(b) requires EPA to establish a schedule for submission of such plans for certain pollutants when the Administrator promulgates the designation of an area as nonattainment, and section 107(d)(1)(B) allows up to

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<sup>5</sup> For example: Section 110(a)(2)(E)(i) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a SIP-approved program to address certain sources as required by part C of title I of the CAA; and section 110(a)(2)(G) provides that states must have legal authority to address emergencies as well as contingency plans that are triggered in the event of such emergencies.

<sup>6</sup> *See, e.g.*, “Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NOx SIP Call; Final Rule,” 70 FR 25162, at 25163 – 65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

two years, or in some cases three years, for such designations to be promulgated.<sup>7</sup> This ambiguity illustrates that rather than apply all the stated requirements of section 110(a)(2) in a strict literal sense, EPA must determine which provisions of section 110(a)(2) are applicable for a particular infrastructure SIP submission.

Another example of ambiguity within sections 110(a)(1) and 110(a)(2) with respect to infrastructure SIPs pertains to whether states must meet all of the infrastructure SIP requirements in a single SIP submission, and whether EPA must act upon such SIP submission in a single action. Although section 110(a)(1) directs states to submit “a plan” to meet these requirements, EPA interprets the CAA to allow states to make multiple SIP submissions separately addressing infrastructure SIP elements for the same NAAQS. If states elect to make such multiple SIP submissions to meet the infrastructure SIP requirements, EPA can elect to act on such submissions either individually or in a larger combined action.<sup>8</sup> Similarly, EPA interprets the CAA to allow it to take action on the individual parts of one larger, comprehensive infrastructure SIP submission for a given NAAQS without concurrent action on the entire submission. For

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<sup>7</sup> EPA notes that this ambiguity within section 110(a)(2) is heightened by the fact that various subparts of part D set specific dates for submission of certain types of SIP submissions in designated nonattainment areas for various pollutants. Note, e.g., that section 182(a)(1) provides specific dates for submission of emissions inventories for the ozone NAAQS. Some of these specific dates are necessarily later than three years after promulgation of the new or revised NAAQS.

<sup>8</sup> See, e.g., “Approval and Promulgation of Implementation Plans; New Mexico; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) Permitting,” 78 FR 4339 (January 22, 2013) (EPA’s final action approving the structural PSD elements of the New Mexico SIP submitted by the State separately to meet the requirements of EPA’s 2008 PM<sub>2.5</sub> NSR rule), and “Approval and Promulgation of Air Quality Implementation Plans; New Mexico; Infrastructure and Interstate Transport Requirements for the 2006 PM<sub>2.5</sub> NAAQS,” (78 FR 4337) (January 22, 2013) (EPA’s final action on the infrastructure SIP for the 2006 PM<sub>2.5</sub> NAAQS).

example, EPA has sometimes elected to act at different times on various elements and sub-elements of the same infrastructure SIP submission.<sup>9</sup>

Ambiguities within sections 110(a)(1) and 110(a)(2) may also arise with respect to infrastructure SIP submission requirements for different NAAQS. Thus, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS. The states' attendant infrastructure SIP submissions for each NAAQS therefore could be different. For example, the monitoring requirements that a state might need to meet in its infrastructure SIP submission for purposes of section 110(a)(2)(B) could be very different for different pollutants because the content and scope of a state's infrastructure SIP submission to meet this element might be very different for an entirely new NAAQS than for a minor revision to an existing NAAQS.<sup>10</sup>

EPA notes that interpretation of section 110(a)(2) is also necessary when EPA reviews other types of SIP submissions required under the CAA. Therefore, as with infrastructure SIP submissions, EPA also has to identify and interpret the relevant elements of section 110(a)(2) that logically apply to these other types of SIP submissions. For example, section 172(c)(7) requires that attainment plan SIP submissions required by part D have to meet the "applicable requirements" of section 110(a)(2). Thus, for example, attainment plan SIP submissions must meet the requirements of section 110(a)(2)(A) regarding enforceable emission limits and control measures and section 110(a)(2)(E)(i) regarding air agency resources and authority. By contrast,

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<sup>9</sup> On December 14, 2007, the State of Tennessee, through the Tennessee Department of Environment and Conservation, made a SIP revision to EPA demonstrating that the State meets the requirements of sections 110(a)(1) and (2). EPA proposed action for infrastructure SIP elements (C) and (J) on January 23, 2012 (77 FR 3213) and took final action on March 14, 2012 (77 FR 14976). On April 16, 2012 (77 FR 22533) and July 23, 2012 (77 FR 42997), EPA took separate proposed and final actions on all other section 110(a)(2) infrastructure SIP elements of Tennessee's December 14, 2007 submittal.

<sup>10</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.

it is clear that attainment plan SIP submissions required by part D would not need to meet the portion of section 110(a)(2)(C) that pertains to the PSD program required in part C of title I of the CAA, because PSD does not apply to a pollutant for which an area is designated nonattainment and thus subject to part D planning requirements. As this example illustrates, each type of SIP submission may implicate some elements of section 110(a)(2) but not others.

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

Historically, EPA has elected to use guidance documents to make recommendations to states for infrastructure SIPs, in some cases conveying needed interpretations on newly arising issues and in some cases conveying interpretations that have already been developed and applied to individual SIP submissions for particular elements.<sup>11</sup> EPA most recently issued guidance for infrastructure SIPs on September 13, 2013 (2013 Guidance).<sup>12</sup> EPA developed this document to

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<sup>11</sup> EPA notes, however, that nothing in the CAA requires EPA to provide guidance or to promulgate regulations for infrastructure SIP submissions. The CAA directly applies to states and requires the submission of infrastructure SIP submissions, regardless of whether or not EPA provides guidance or regulations pertaining to such submissions. EPA elects to issue such guidance in order to assist states, as appropriate.

<sup>12</sup> “Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2),” Memorandum from Stephen D. Page, September 13, 2013.

provide states with up-to-date guidance for infrastructure SIPs for any new or revised NAAQS. Within this guidance, EPA describes the duty of states to make infrastructure SIP submissions to meet basic structural SIP requirements within three years of promulgation of a new or revised NAAQS. EPA also made recommendations about many specific subsections of section 110(a)(2) that are relevant in the context of infrastructure SIP submissions.<sup>13</sup> The guidance also discusses the substantively important issues that are germane to certain subsections of section 110(a)(2). Significantly, EPA interprets sections 110(a)(1) and 110(a)(2) such that infrastructure SIP submissions need to address certain issues and need not address others. Accordingly, EPA reviews each infrastructure SIP submission for compliance with the applicable statutory provisions of section 110(a)(2), as appropriate.

As an example, section 110(a)(2)(E)(ii) is a required element of section 110(a)(2) for infrastructure SIP submissions. Under this element, a state must meet the substantive requirements of section 128, which pertain to state boards that approve permits or enforcement orders and heads of executive agencies with similar powers. Thus, EPA reviews infrastructure SIP submissions to ensure that the state's implementation plan appropriately addresses the requirements of section 110(a)(2)(E)(ii) and section 128. The 2013 Guidance explains EPA's interpretation that there may be a variety of ways by which states can appropriately address these substantive statutory requirements, depending on the structure of an individual state's permitting or enforcement program (*e.g.*, whether permits and enforcement orders are approved by a multi-member board or by a head of an executive agency). However they are addressed by the state,

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<sup>13</sup> EPA's September 13, 2013, guidance did not make recommendations with respect to infrastructure SIP submissions to address section 110(a)(2)(D)(i)(I). EPA issued the guidance shortly after the U.S. Supreme Court agreed to review the D.C. Circuit decision in *EME Homer City*, 696 F.3d7 (D.C. Cir. 2012) which had interpreted the requirements of section 110(a)(2)(D)(i)(I). In light of the uncertainty created by ongoing litigation, EPA elected not to provide additional guidance on the requirements of section 110(a)(2)(D)(i)(I) at that time. As the guidance is neither binding nor required by statute, whether EPA elects to provide guidance on a particular section has no impact on a state's CAA obligations.

the substantive requirements of section 128 are necessarily included in EPA's evaluation of infrastructure SIP submissions because section 110(a)(2)(E)(ii) explicitly requires that the state satisfy the provisions of section 128.

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

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

With respect to certain other issues, EPA does not believe that an action on a state's infrastructure SIP submission is necessarily the appropriate type of action in which to address possible deficiencies in a state's existing SIP. These issues include: (i) existing provisions related to excess emissions from sources during periods of startup, shutdown, or malfunction that may be contrary to the CAA and EPA's policies addressing such excess emissions ("SSM"); (ii) existing provisions related to "director's variance" or "director's discretion" that may be contrary to the CAA because they purport to allow revisions to SIP-approved emissions limits while limiting public process or not requiring further approval by EPA; and (iii) existing provisions for PSD programs that may be inconsistent with current requirements of EPA's "Final NSR Improvement Rule," 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) ("NSR Reform"). Thus, EPA believes it may approve an infrastructure SIP submission without scrutinizing the totality of the existing SIP for such potentially deficient provisions and may approve the submission even if it is aware of such existing provisions.<sup>14</sup> It is important to note that EPA's approval of a state's infrastructure SIP submission should not be construed as explicit or implicit re-approval of any existing potentially deficient provisions that relate to the three specific issues just described.

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

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<sup>14</sup> By contrast, EPA notes that if a state were to include a new provision in an infrastructure SIP submission that contained a legal deficiency, such as a new exemption for excess emissions during SSM events, then EPA would need to evaluate that provision for compliance against the rubric of applicable CAA requirements in the context of the action on the infrastructure SIP.

requirements in the CAA and EPA regulations 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. These provisions, while not fully up to date, nevertheless may not pose a significant problem for the purposes of “implementation, maintenance, and enforcement” of a new or revised NAAQS when EPA evaluates adequacy of the infrastructure SIP submission. EPA believes that a better approach is for states and EPA to focus attention on those elements of section 110(a)(2) of the CAA most likely to warrant a specific SIP revision due to the promulgation of a new or revised NAAQS or other factors.

For example, EPA’s 2013 Guidance gives simpler recommendations with respect to carbon monoxide than other NAAQS pollutants to meet the visibility requirements of section 110(a)(2)(D)(i)(II), because carbon monoxide does not affect visibility. As a result, an infrastructure SIP submission for any future new or revised NAAQS for carbon monoxide need only state this fact in order to address the visibility prong of section 110(a)(2)(D)(i)(II). Finally, EPA believes that its approach with respect to infrastructure SIP requirements is based on a reasonable reading of sections 110(a)(1) and 110(a)(2) because the CAA provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow EPA to take appropriately tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a “SIP call” whenever the Agency determines that a state’s implementation plan is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or to otherwise

comply with the CAA.<sup>15</sup> Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.<sup>16</sup> Significantly, EPA’s determination that an action on a state’s infrastructure SIP submission is not the appropriate time and place to address all potential existing SIP deficiencies does not preclude EPA’s subsequent reliance on provisions in section 110(a)(2) as part of the basis for action to correct those deficiencies at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director’s discretion provisions in the course of acting on an infrastructure SIP submission, EPA believes that section 110(a)(2)(A) may be among the statutory bases that EPA relies upon in the course of addressing such deficiency in a subsequent action.<sup>17</sup>

#### **IV. What is EPA’s Analysis of How Mississippi Addressed the Elements of Sections 110(a)(1) and (2) “Infrastructure” Provisions?**

Mississippi’s February 28, 2013, infrastructure submission addresses the provisions of sections 110(a)(1) and (2) as described later on.

##### **1. 110(a)(2)(A) *Emission Limits and Other Control Measures*:** Section 110(a)(2)(A) requires

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<sup>15</sup> For example, EPA issued a SIP call to Utah to address specific existing SIP deficiencies related to the treatment of excess emissions during SSM events. See “Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revisions,” 74 FR 21639 (April 18, 2011).

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

<sup>17</sup> See, e.g., EPA’s disapproval of a SIP submission from Colorado on the grounds that it would have included a director’s discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, e.g., 75 FR 42342 at 42344 (July 21, 2010) (proposed disapproval of director’s discretion provisions); 76 FR 4540 (January 26, 2011) (final disapproval of such provisions).

that each implementation plan include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements. Mississippi's infrastructure SIP submission provides an overview of the provisions of the Mississippi Air Pollution Control (APC) regulations relevant to air quality control. *Mississippi Code Title 49, Section 49-17-17(h)* (Appendix A-9),<sup>18</sup> authorizes MDEQ to adopt, modify, or repeal ambient air quality standards and emissions standards for the control of air pollution, including those necessary to obtain EPA approval under section 110 of the CAA. Sections APC-S-1, *Air Emission Regulations for the Prevention, Abatement, and Control of Air Contaminants*, and APC-S-3, *Regulations for the Prevention of Air Pollution Emergency Episodes*, establish enforceable emissions limitations and other control measures, means or techniques, for activities that contribute to NO<sub>2</sub> concentrations in the ambient air and provide authority for MDEQ to establish such limits and measures as well as schedules for compliance through SIP-approved permits to meet the applicable requirements of the CAA. EPA has made the preliminary determination that the provisions contained in these regulations, and Mississippi's statute are adequate for enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance for the 2010 1-hour NO<sub>2</sub> NAAQS in the State.

In this action, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during SSM operations at a facility. EPA believes that a number of states have SSM provisions which are contrary to the CAA and existing EPA

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<sup>18</sup> *Mississippi Code Title 49* is referenced in the State's infrastructure SIP submissions as "Appendix A-9." As discussed, unless otherwise indicated herein, portions of the Mississippi Code referenced in this proposal are not incorporated into the SIP.

guidance, “State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown” (September 20, 1999), and the Agency is addressing such state regulations in a separate action.<sup>19</sup>

Additionally, in this action, EPA is not proposing to approve or disapprove any existing state rules with regard to director’s discretion or variance provisions. EPA believes that a number of states have such provisions which are contrary to the CAA and existing EPA guidance (52 FR 45109 (November 24, 1987)), and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a director’s discretion or variance provision which is contrary to the CAA and EPA guidance to take steps to correct the deficiency as soon as possible.

**2. 110(a)(2)(B) *Ambient air quality monitoring/data system:*** Section 110(a)(2)(B) requires SIPs to provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator. Section APC-S-1, *Air Emission Regulations for the Prevention, Abatement, and Control of Air Contaminants*, and *Mississippi Code Title 49, Section 49-17-17(g)*, provides MDEQ with the authority to collect and disseminate information relating to air quality and pollution and the prevention, control, supervision, and abatement thereof. Annually, States develop and submit to EPA for approval statewide ambient monitoring network plans consistent with the requirements of 40 CFR parts 50, 53, and 58. The annual network plan involves an evaluation of any proposed changes to the monitoring network, includes the annual ambient monitoring network design plan and a certified

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<sup>19</sup> On June 12, 2015, EPA published a final action entitled, “State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction.” See 80 FR 33840.

evaluation of the agency's ambient monitors and auxiliary support equipment.<sup>20</sup> On June 9, 2015, Mississippi submitted its monitoring network plan to EPA, and on October 6, 2015, EPA approved this plan. Mississippi's approved monitoring network plan can be accessed at [www.regulations.gov](http://www.regulations.gov) using Docket ID No. EPA-R04-OAR-2014-0751. EPA has made the preliminary determination that Mississippi's SIP and practices are adequate for the ambient air quality monitoring and data system requirements related to the 2010 1-hour NO<sub>2</sub> NAAQS.

**3. 110(a)(2)(C) Programs for Enforcement of Control Measures and for Construction or Modification of Stationary Sources:** Section 110(a)(2)(C) consists of three sub-elements; enforcement, state-wide regulation of new and modified minor sources and minor modifications of major sources; and preconstruction permitting of major sources and major modifications in areas designated attainment or unclassifiable for the subject NAAQS as required by CAA title I part C (i.e., the major source PSD program). To meet the requirements for this element, MDEQ cited Section APC-S-5, *Mississippi Regulations for the Prevention of Significant Deterioration of Air Quality*, Section APC-S-2, *Permit Regulations for the Construction and/or Operation of Air Emissions Equipment*. These regulations enable MDEQ to regulate sources contributing to the 2010 1-hour NO<sub>2</sub> NAAQS through enforceable permits.

**Enforcement:** MDEQ's APC-S-2, *Permit Regulation for the Construction and/or Operation of Air Emissions Equipment*, Section VI provides for the enforcement of NO<sub>2</sub> emission limits and control measures through construction permitting for new or modified stationary sources. Also note that under *Mississippi Code Title 49, Chapter 17*, MDEQ has enforcement authority to seek

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<sup>20</sup> On occasion, proposed changes to the monitoring network are evaluated outside of the network plan approval process in accordance with 40 CFR part 58.

penalties and injunctive relief for violations of emission limits and other control measures and violations of permits.

**PSD Permitting for Major Sources:** With respect to Mississippi's February 28, 2013, infrastructure SIP submission related to the PSD permitting requirements for major sources of section 110(a)(2)(C), EPA took final action to approve these provisions for the 2010 1-hour NO<sub>2</sub> NAAQS on March 18, 2015. *See* 80 FR 14019.

**Regulation of minor sources and modifications:** Section 110(a)(2)(C) also requires the SIP to include provisions that govern the minor source preconstruction program that regulates emissions of the 2010 1-hour NO<sub>2</sub> NAAQS. Mississippi has a SIP-approved minor NSR permitting program at Section APC-S-2, Section I. D, *Permitting Requirements* that regulates the preconstruction permitting of modifications and construction of minor stationary sources.

EPA has made the preliminary determination that Mississippi's SIP and practices are adequate for program enforcement of control measures and regulation of minor sources and modifications related to the 2010 1-hour NO<sub>2</sub> NAAQS.

**4. 110(a)(2)(D)(i)(I) and (II) *Interstate Pollution Transport:*** Section 110(a)(2)(D)(i) has two components; 110(a)(2)(D)(i)(I) and 110(a)(2)(D)(i)(II). Each of these components have two subparts resulting in four distinct components, commonly referred to as "prongs," that must be addressed in infrastructure SIP submissions. The first two prongs, which are codified in section 110(a)(2)(D)(i)(I), are provisions that prohibit any source or other type of emissions activity in one state from contributing significantly to nonattainment of the NAAQS in another state ("prong 1"), and interfering with maintenance of the NAAQS in another state ("prong 2"). The third and fourth prongs, which are codified in section 110(a)(2)(D)(i)(II), are provisions that

prohibit emissions activity in one state from interfering with measures required to prevent significant deterioration of air quality in another state (“prong 3”), or to protect visibility in another state (“prong 4”).

**110(a)(2)(D)(i)(I) – prongs 1 and 2:** EPA is not proposing any action in this rulemaking related to the interstate transport provisions pertaining to the contribution to nonattainment or interference with maintenance in other states of section 110(a)(2)(D)(i)(I) (prongs 1 and 2) because Mississippi’s 2010 1-hour NO<sub>2</sub> NAAQS infrastructure submission did not address prongs 1 and 2.

**110(a)(2)(D)(i)(II) – prong 3:** With respect to Mississippi’s infrastructure SIP submission related to the interstate transport requirements for PSD of section 110(a)(2)(D)(i)(II) (prong 3), EPA took final action to approve Mississippi’s February 28, 2013, infrastructure SIP submission regarding prong 3 of D(i) for the 2010 1-hour NO<sub>2</sub> NAAQS on March 18, 2015. *See* 80 FR 14019.

**110(a)(2)(D)(i)(II) – prong 4:** EPA is not proposing any action in this rulemaking related to the interstate transport provisions pertaining to visibility protection in other states of section 110(a)(2)(D)(i)(II) (prong 4) and will consider these requirements in relation to Mississippi’s 2010 1-hour NO<sub>2</sub> NAAQS infrastructure submission in a separate rulemaking.

**5. 110(a)(2)(D)(ii) *Interstate Pollution Abatement and International Air Pollution:*** Section 110(a)(2)(D)(ii) requires SIPs to include provisions ensuring compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement. Section APC-S-5, *Mississippi Regulations for the Prevention of Significant Deterioration of Air Quality* provides how MDEQ will notify neighboring states of potential impacts from new or modified sources

consistent with the requirements of 40 CFR 51.166, which is adopted by reference into the Mississippi SIP. Additionally, Mississippi does not have any pending obligation under section 115 and 126 of the CAA. EPA has made the preliminary determination that Mississippi's SIP and practices are adequate for insuring compliance with the applicable requirements relating to interstate and international pollution abatement for the 2010 1-hour NO<sub>2</sub> NAAQS.

**6. 110(a)(2)(E) Adequate Resources and Authority, Conflict of Interest, and Oversight of**

**Local Governments and Regional Agencies:** Section 110(a)(2)(E) requires that each implementation plan provide (i) necessary assurances that the State will have adequate personnel, funding, and authority under state law to carry out its implementation plan, (ii) that the State comply with the requirements respecting State Boards pursuant to section 128 of the Act, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provisions. EPA is proposing to approve Mississippi's SIP as meeting the requirements of sections 110(a)(2)(E)(i) and (iii). EPA is proposing to approve in part and disapprove in part Mississippi's SIP respecting section 110(a)(2)(E)(ii). EPA's rationale for the proposals respecting each section of 110(a)(2)(E) is described later on.

To satisfy the requirements of sections 110(a)(2)(E)(i) and (iii), Mississippi provides that MDEQ is responsible for promulgating rules and regulations for the NAAQS, emissions standards, general policies, a system of permits, fee schedules for the review of plans, and other planning needs as found in *Mississippi Code Title 49*, Section 49-17-17(d) and Section 49-17-17(h) (Appendix A-9). As evidence of the adequacy of MDEQ's resources with respect to sub-elements (i) and (iii), EPA submitted a letter to Mississippi on April 19, 2016, outlining 105

grant commitments and the current status of these commitments for fiscal year 2015. The letter EPA submitted to Mississippi can be accessed at [www.regulations.gov](http://www.regulations.gov) using Docket ID No. EPA-R04-OAR-2014-0751. Annually, states update these grant commitments based on current SIP requirements, air quality planning, and applicable requirements related to the NAAQS. There were no outstanding issues in relation to the SIP for fiscal year 2015, therefore, MDEQ's grants were finalized and closed out. EPA has made the preliminary determination that Mississippi has adequate resources for implementation of the 2010 1-hour NO<sub>2</sub> NAAQS.

To meet the requirements of section 110(a)(2)(E)(ii), states must comply with the requirements respecting state boards pursuant to section 128 of the Act. Section 128 of the CAA requires that states include provisions in their SIP to address conflicts of interest for state boards or bodies that oversee CAA permits and enforcement orders and disclosure of conflict of interest requirements. Specifically, CAA section 128(a)(1) necessitates that each SIP shall require that at least a majority of any board or body which approves permits or enforcement orders shall be subject to the described public interest service and income restrictions therein. Subsection 128(a)(2) requires that the members of any board or body, or the head of an executive agency with similar power to approve permits or enforcement orders under the CAA, shall also be subject to conflict of interest disclosure requirements.

To meet its section 110(a)(2)(E)(ii) obligations for the 2010 1-hour NO<sub>2</sub> NAAQS, Mississippi's infrastructure SIP submission cites Article 4, Section 109 of the Mississippi Constitution and portions of Mississippi Code sections 25-4-25, -27, -29, -103, -105, and -109. These provisions were incorporated into the Mississippi SIP to meet CAA section 128 requirements in EPA's final action for the 1997 and 2006 PM<sub>2.5</sub> NAAQS infrastructure SIP. *See*

78 FR 20793.<sup>21</sup> In this same final action for the 1997 and 2006 PM<sub>2.5</sub> NAAQS infrastructure SIP (78 FR 20793), EPA disapproved Mississippi's October 11, 2012, submission as not satisfying the significant portion of income requirement of section 128(a)(1).

With respect to the public interest requirement of section 128(a)(1) and the adequate disclosure of conflicts of interest requirement of section 128(a)(2), EPA has previously found these requirements to be satisfied by the existing provisions in Mississippi's SIP. *See* 78 FR 20793.

With respect to the significant portion of income requirement of section 128(a)(1), the provisions included in the February 28, 2013 infrastructure SIP submission do not preclude at least a majority of the members of the Mississippi Boards<sup>22</sup> from receiving a significant portion of their income from persons subject to permits or enforcement orders issued by such Boards. While the submitted laws and provisions preclude members of the Mississippi Boards from certain types of income (e.g., contracts with State or political subdivisions thereof, or income obtained through the use of his or her public office or obtained to influence a decision of the Mississippi Boards), they do not preclude a majority of members of the Mississippi Boards from deriving any significant portion of their income from persons subject to permits or enforcement orders so long as that income is not derived from one of the proscribed methods described in the laws and provisions submitted by the State. To date, because a majority of board members may still derive a significant portion of income from persons subject to permits or enforcement orders

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<sup>21</sup> This final action pertained to Mississippi's October 11, 2012, infrastructure SIP submission and only addressed compliance with 110(a)(2)(E)(ii) respecting CAA section 128 requirements.

<sup>22</sup>The Mississippi Commission on Environmental Quality issues and supervises enforcement orders, and the Mississippi Department of Environmental Quality Permit Board has the authority to issue, modify, revoke or deny permits.

issued by the Mississippi Boards, the Mississippi SIP does not meet the section 128(a)(1) majority requirements respecting significant portion of income, and as such, EPA is proposing to disapprove the State's 110(a)(2)(E)(ii) submission as it relates only to this portion of section 128(a)(1).

Accordingly, EPA is proposing to approve the section 110(a)(2)(E)(ii) submission as it relates to the public interest requirements of section 128(a)(1) and the conflict of interest disclosure provisions of section 128(a)(2) and proposing to disapprove Mississippi's section 110(a)(2)(E)(ii) submission as it pertains to compliance with the significant portion of income requirement of section 128(a)(1) for the 2010 1-hour NO<sub>2</sub> NAAQS.

**7. 110(a)(2)(F) *Stationary Source Monitoring and Reporting*:** Section 110(a)(2)(F) requires SIPs to meet applicable requirements addressing: (i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions related data from such sources, and (iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to this section, which reports shall be available at reasonable times for public inspection. Section APC-S-2, *Permit Regulations for the Construction and/or Operation of Air Emissions Equipment*, establishes requirements for emissions compliance testing utilizing emissions sampling and analysis. It further describes how the State ensures the quality of its data through observing emissions and monitoring operations. MDEQ uses these data to track progress towards maintaining the NAAQS, develop control and maintenance strategies, identify sources and general emission levels, and determine compliance with emission regulations and additional EPA requirements. *Mississippi Code 49*, Section 49-17-21 (Appendix A-9) provides

MDEQ with the authority to require the maintenance of records related to the operation of air contaminant sources and any authorized representative of the Commission may examine and copy any such records or memoranda pertaining to the operation of such contaminant source. Section APC-S-2 lists requirements for compliance testing and reporting that is required to be included in any MDEQ air pollution permit and requires that copies of records relating to the operation of air contamination sources be submitted to the Permit Board as required by the permit or upon request. Section APC-S-1, *Air Emission Regulations For The Prevention, Abatement, and Control of Air Contaminants*, authorizes source owners or operators to use any credible evidence or information relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed, for the purpose of submitting compliance certifications. EPA is unaware of any provision preventing the use of credible evidence in the Mississippi SIP.

Additionally, Mississippi is required to submit emissions data to EPA for purposes of the National Emissions Inventory (NEI). The NEI is EPA's central repository for air emissions data. EPA published the Air Emissions Reporting Rule (AERR) on December 5, 2008, which modified the requirements for collecting and reporting air emissions data (73 FR 76539). The AERR shortened the time states had to report emissions data from 17 to 12 months, giving states one calendar year to submit emissions data. All states are required to submit a comprehensive emissions inventory every three years and report emissions for certain larger sources annually through EPA's online Emissions Inventory System (EIS). States report emissions data for the six criteria pollutants and the precursors that form them – nitrogen oxides, sulfur dioxide, ammonia, lead, carbon monoxide, particulate matter, and volatile organic compounds. Many states also voluntarily report emissions of hazardous air pollutants. Mississippi made its latest

update to the 2012 NEI on January 9, 2014. EPA compiles the emissions data, supplementing it where necessary, and releases it to the general public through the website <http://www.epa.gov/ttn/chief/eiinformation.html>. EPA has made the preliminary determination that Mississippi's SIP and practices are adequate for the stationary source monitoring systems related to the 2010 1-hour NO<sub>2</sub> NAAQS.

**8. 110(a)(2)(G) Emergency Powers:** Section 110(a)(2)(G) requires that states demonstrate authority comparable with section 303 of the CAA and adequate contingency plans to implement such authority. *Mississippi Code Title 49, Section 49-17-27 (Appendix A-9) and APC-S-3, Regulations for the Prevention of Air Pollution Emergency Episodes*, identify air pollution emergency episodes and preplanned abatement strategies. Specifically, Section APC-S-3 authorizes the MDEQ Director, once it has been determined that an Air Pollution Emergency Episode condition exists at one or more monitoring sites solely because of emissions from a limited number of sources, to order source(s) to put into effect the emission control programs which are applicable for each episode stage. Section APC-S-3 also lists regulations to prevent the excessive buildup of air pollutants during air pollution episodes. Also, *Mississippi Code Title 49, Section 49-17-27 (Appendix A-9)*, states that in the event an emergency is found to exist by the Mississippi Commission on Environmental Quality, it may issue an emergency order as circumstances may require. Emergency situations include those which create an imminent and substantial endangerment threatening the public health and safety or the lives and property of the people in Mississippi. EPA has made the preliminary determination that Mississippi's SIP is adequate for emergency powers related to the 2010 1-hour NO<sub>2</sub> NAAQS. Accordingly, EPA is proposing to approve Mississippi's infrastructure SIP submission with respect to section 110(a)(2)(G).

**9. 110(a)(2)(H) SIP Revisions:** Section 110(a)(2)(H), in summary, requires each SIP to provide for revisions of such plan (i) as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii) whenever the Administrator finds that the plan is substantially inadequate to attain the NAAQS or to otherwise comply with any additional applicable requirements. MDEQ is responsible for adopting air quality rules and revising SIPs as needed to attain or maintain the NAAQS in Mississippi. The State has the ability and authority to respond to calls for SIP revisions, and has provided a number of SIP revisions over the years for implementation of the NAAQS. *Mississippi Code Title 49, Section 49-17-17(h)* (Appendix A-9), provides MDEQ with the statutory authority to adopt, modify or repeal and promulgate ambient air and water quality standards and emissions standards for the State. As such, the State has the authority to revise the SIP to accommodate changes to NAAQS and revise the SIP if the EPA Administrator finds the plan to be substantially inadequate to attain the NAAQS. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate a commitment to provide future SIP revisions related to the 2010 1-hour NO<sub>2</sub> NAAQS when necessary.

**10. 110(a)(2)(J) Consultation with Government Officials, Public Notification, and PSD and Visibility Protection:** EPA is proposing to approve Mississippi's infrastructure SIP submission for the 2010 1-hour NO<sub>2</sub> NAAQS with respect to the general requirement in section 110(a)(2)(J) to include a program in the SIP that provides for meeting the applicable consultation requirements of section 121, the public notification requirements of section 127; and visibility protection requirements of part C of the Act. With respect to Mississippi's infrastructure SIP submission related to the preconstruction PSD permitting requirements of section 110(a)(2)(J),

EPA took final action to approve Mississippi's February 28, 2013, 2010 1-hour NO<sub>2</sub> NAAQS infrastructure SIP for these requirements on March 18, 2015. *See* 80 FR 14019. EPA's rationale for its proposed action regarding applicable consultation requirements of section 121, the public notification requirements of section 127, and visibility protection requirements is described later in this document.

**Consultation with government officials (121 consultation):** Section 110(a)(2)(J) of the CAA requires states to provide a process for consultation with local governments, designated organizations and federal land managers carrying out NAAQS implementation requirements pursuant to section 121 relative to consultation. Section APC-S-5, *Mississippi Regulations for the Prevention of Significant Deterioration of Air Quality* and *Mississippi Code Title 49, Section 49-17-17(c)* (Appendix A-9), along with the State's various implementations plans, such as the State's Regional Haze Implementation Plan, provide for consultation between appropriate state, local, and tribal air pollution control agencies as well as the corresponding Federal Land Managers whose jurisdictions might be affected by SIP development activities. Mississippi adopted state-wide consultation procedures for the implementation of transportation conformity. These consultation procedures were developed in coordination with the transportation partners in the State and are consistent with the approaches used for development of mobile inventories for SIPs. Implementation of transportation conformity as outlined in the consultation procedures requires MDEQ to consult with federal, state and local transportation and air quality agency officials on the development of motor vehicle emissions budgets. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate that the State meets applicable requirements related to consultation with government officials for the 2010 1-hour NO<sub>2</sub> NAAQS when necessary. Accordingly, EPA is proposing to approve Mississippi's

infrastructure SIP submissions with respect to section 110(a)(2)(J) consultation with government officials.

**Public notification (127 public notification):** These requirements are met through regulation Section APC-S-3, *Mississippi Regulations for the Prevention of Air Pollution Emergency Episodes*, which requires that MDEQ notify the public of any air pollution alert, warning, or emergency. The MDEQ website also provides air quality summary data, air quality index reports and links to more information regarding public awareness of measures that can prevent such exceedances and of ways in which the public can participate in regulatory and other efforts to improve air quality. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate the State's ability to provide public notification related to the 2010 1-hour NO<sub>2</sub> NAAQS when necessary. Accordingly, EPA is proposing to approve Mississippi's infrastructure SIP submissions with respect to section 110(a)(2)(J) public notification.

**Visibility protection:** EPA's 2013 Guidance notes that it does not treat the visibility protection aspects of section 110(a)(2)(J) as applicable for purposes of the infrastructure SIP approval process. MDEQ referenced its regional haze program as germane to the visibility component of section 110(a)(2)(J). EPA recognizes that states are subject to visibility protection and regional haze program requirements under Part C of the Act (which includes sections 169A and 169B). However, there are no newly applicable visibility protection obligations after the promulgation of a new or revised NAAQS. Thus, EPA has determined that states do not need to address the visibility component of 110(a)(2)(J) in infrastructure SIP submittals so MDEQ does not need to rely on its regional haze program to fulfill its obligations under section 110(a)(2)(J). As such, EPA has made the preliminary determination that Mississippi's infrastructure SIP submission

related to the 2010 1-hour NO<sub>2</sub> NAAQS is approvable for the visibility protection element of section 110(a)(2)(J) and that Mississippi does not need to rely on its regional haze program to address this element.

**11. 110(a)(2)(K) *Air Quality Modeling and Submission of Modeling Data:*** Section

110(a)(2)(K) of the CAA requires that SIPs provide for performing air quality modeling so that effects on air quality of emissions from NAAQS pollutants can be predicted and submission of such data to the EPA can be made. Sections APC-S-2, V. B., *Permit Regulation for the Construction and/or Operation of Air Emissions Equipment*, and APC-S-5, *Mississippi Regulations for the Prevention of Significant Deterioration of Air Quality*, specify that required air modeling be conducted in accordance with 40 CFR Part 51, Appendix W “Guideline on Air Quality Models,” as incorporated into the Mississippi SIP. These standards demonstrate that Mississippi has the authority to perform air quality modeling and provide relevant data for the purpose of predicting the effect on ambient air quality of the 2010 1-hour NO<sub>2</sub> NAAQS. Also of note, *Mississippi Code Title 49, Section 49-17-17(e)* (Appendix A-9),<sup>23</sup> authorizes MDEQ to “encourage, participate in, or conduct studies, investigations, research and demonstrations relating to air and water quality and pollution and causes, prevention, control and abatement as it may deem advisable and necessary for the discharge of its duties under [the Mississippi air and water pollution control law].” Additionally, Mississippi participates in a regional effort to coordinate the development of emissions inventories and conduct regional modeling for several NAAQS, including the 2010 1-hour NO<sub>2</sub> NAAQS, for the southeastern states. Taken as a whole,

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<sup>23</sup> *Mississippi Code Title 49* is referenced in the State’s infrastructure SIP submissions as “Appendix A-9.” As discussed, unless otherwise indicated herein, portions of the Mississippi Code referenced in this proposal are not incorporated into the SIP.

Mississippi's air quality regulations and practices demonstrate that MDEQ has the authority to provide relevant data for the purpose of predicting the effect on ambient air quality of the 2010 1-hour NO<sub>2</sub> NAAQS. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate the State's ability to provide for air quality modeling, along with analysis of the associated data, related to the 2010 1-hour NO<sub>2</sub> NAAQS when necessary. Accordingly, EPA is proposing to approve Mississippi's infrastructure SIP submissions with respect to section 110(a)(2)(K).

**12. 110(a)(2)(L) *Permitting Fees:*** Section 110(a)(2)(L) requires the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under the CAA, a fee sufficient to cover (i) the reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under title V.

*Mississippi Code Title 49, Section 49-2-9(c)* (Appendix A-9), authorizes MDEQ to apply for, receive, and expend Federal or state funds in order to operate its air programs. *Mississippi Code Title 49, Section 49-17-30* (Appendix A-9), provides for the assessment of Title V permit fees to cover the reasonable cost of reviewing and acting upon air permitting activities in the state including title V, PSD and NNSR permits. *Mississippi Code Title 49, Section 49-17-14* (Appendix A-9), allows MDEQ to expend or utilize monies in the Mississippi Air Operating Permit Program Fee Trust Fund to pay all reasonable direct and indirect costs associated with the development and administration of the title V program and the PSD and NNSR permitting

including. The Mississippi Air Operating Permit Program Fee Trust Fund consists of state legislative appropriations, Federal grant funds and title V fees. Additionally, Mississippi has a federally-approved title V operating permit program at Section APC-S-6<sup>24</sup> that covers the implementation and enforcement of PSD and NNSR permits after they have been issued. EPA has made the preliminary determination that Mississippi adequately provides for permitting fees related to the 2010 1-hour NO<sub>2</sub> NAAQS when necessary.

**13. 110(a)(2)(M) Consultation and Participation by Affected Local Entities:** Section 110(a)(2)(M) requires states to provide for consultation and participation in SIP development by local political subdivisions affected by the SIP. *Mississippi Code Title 49, Appendix A-9, Section 49-17-17(c)*, gives the Commission the statutory authority to advise and consult with any political subdivisions in the State. *Mississippi Code Title 49, Appendix A-9, Section 49-17-19(b)* requires the Commission to conduct public hearings in accordance with EPA regulations prior to establishing, amending, or repealing standards of air quality. Additionally, MDEQ works closely with local political subdivisions during the development of its transportation conformity SIP and regional haze SIP. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate consultation with affected local entities related to the 2010 1-hour NO<sub>2</sub> NAAQS when necessary.

## **V. Proposed Action**

With the exception of the preconstruction PSD permitting requirements for major sources of section 110(a)(2)(C), prong 3 of (D)(i), and (J), the interstate transport provisions pertaining to

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<sup>24</sup> Title V program regulations are federally-approved but not incorporated into the federally-approved SIP.

the contribution to nonattainment or interference with maintenance in other states and visibility protection of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2, and 4), and the state board majority requirements respecting the significant portion of income of section 110(a)(2)(E)(ii), EPA is proposing to approve that Mississippi's February 28, 2013, SIP submission for the 2010 1-hour NO<sub>2</sub> NAAQS has met the above-described infrastructure SIP requirements because these aspects of the submission are consistent with section 110 of the CAA. EPA is proposing to disapprove in part section 110(a)(2)(E)(ii) of Mississippi's infrastructure submission because a majority of board members may still derive a significant portion of income from persons subject to permits or enforcement orders issued by the Mississippi Boards. Therefore, its current SIP does not meet the section 128(a)(1) majority requirements respecting significant portion of income. This proposed action, however, does not include the preconstruction PSD permitting requirements for major sources of section 110(a)(2)(C), prong 3 of (D)(i), and (J), which have been approved in a separate action, or the interstate transport provisions pertaining to the contribution to nonattainment or interference with maintenance in other states of prongs 1, 2 and 4 of section 110(a)(2)(D)(i), which will be addressed by EPA in a separate action.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of a CAA Part D Plan or is required in response to a finding of substantial inadequacy as described in CAA section 110(k)(5) (SIP call) starts a sanctions clock. The portion of section 110(a)(2)(E)(ii) provisions (the provisions being proposed for disapproval in this action) were not submitted to meet requirements for Part D or a SIP call, and therefore, if EPA takes final action to disapprove this submittal, no sanctions will be triggered. However, if this disapproval action is finalized, that final action will trigger the requirement under section 110(c) that EPA promulgate a federal implementation plan (FIP) no later than 2 years from the

date of the disapproval unless the State corrects the deficiency, and EPA approves the plan or plan revision before EPA promulgates such FIP.

## **VI. 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, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

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

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

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

Dated: May 12, 2016.

Heather McTeer Toney

Regional Administrator,

Region 4.

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