



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2019-0140; FRL-10006-29-Region 8]

Approval and Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 2015 Ozone National Ambient Air Quality Standards; Colorado and North Dakota

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action on Colorado and North Dakota's Clean Air Act (CAA) state implementation plan (SIP) submissions with respect to infrastructure requirements for the 2015 ozone National Ambient Air Quality Standards (NAAQS). Specifically, the EPA is approving Colorado's September 17, 2018, infrastructure SIP in full, and approving North Dakota's November 6, 2018 infrastructure SIP in part (and disapproving in part). We are also approving a portion of North Dakota's May 2, 2019, submission of Chapter 33.1-15-15, the air pollution control rules of the State of North Dakota, that updates the date of incorporation by reference (IBR) of Federal rules.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2019-0140 All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, *e.g.*, CBI or

other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <http://www.regulations.gov>, or please contact the persons identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Amrita Singh, (303) 312-6103, singh.amrita@epa.gov; or Clayton Bean, (303) 312-6143, bean.clayton@epa.gov. Mail can be directed to the Air and Radiation Division, U.S. EPA, Region 8, Mail-code 8ARD-IO, 1595 Wynkoop Street, Denver, Colorado, 80202-1129.

SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” and “our” means the EPA.

I. Background

On March 12, 2008, the EPA promulgated a new NAAQS for ozone, revising the levels of primary and secondary 8-hour ozone standards from 0.08 parts per million (ppm) to 0.075 ppm (73 FR 16436). More recently, on October 1, 2015, the EPA promulgated and revised the NAAQS for ozone, further strengthening the primary and secondary 8-hour standards to 0.070 ppm (80 FR 65292). The October 1, 2015 standards are known as the 2015 ozone NAAQS.

Section 110(a)(1) of the CAA directs each state to make an infrastructure SIP submission to the EPA within 3 years of promulgation of a new or revised NAAQS. Infrastructure requirements for SIPs are provided in section 110(a)(1) and (2) of the CAA. Section 110(a)(2) lists the specific infrastructure elements that a SIP must contain or satisfy. The elements that are the subject of the action are described in detail in our notice of proposed rulemaking (NPRM) published on July 29, 2019 (84 FR 36516).

II. Response to Comments

Comments on our NPRM were due on or before August 28, 2019. The EPA received two substantive comments on the NPRM. The first comment, pertaining to the Colorado portion of the NPRM, was submitted by the Center for Biological Diversity (CBD); the second comment, pertaining to the North Dakota portion of the NPRM, was submitted by the Dakota Resource Council (DRC). The comments are summarized, and the EPA responds to the comments in the following paragraphs.

Colorado Comment and Response

Comment: Commenter asserts that Colorado's Air Quality Control Commission (AQCC) did not adequately consider its comments before voting to approve Colorado's 2015 ozone infrastructure SIP for submission to the EPA. The commenter states that the AQCC admitted on the record at the public hearing that it had not reviewed its comment, including the supporting exhibits that the commenter had submitted prior to the public hearing and that Colorado's public comment period was not adequate. The commenter maintains that it is arbitrary and contrary to the public comment requirement for a state to grant an opportunity for public comment, but then admit that it did not review the submissions. The commenter acknowledges that the Colorado Air Pollution Control Division (APCD) provided verbal responses to their comments during the hearing, but characterizes these remarks as "off the cuff" statements, which were insufficient because they were not made by the decision-maker itself—the AQCC—and because the comments could only be addressed by performing new air quality modeling.¹

¹ CBD provided supporting material to its written comment in the form of an audio file, which was delivered to the EPA Region 8 offices in Denver, CO. The regulations.gov site does not support the upload of audio files into the docket, however, the audio file is available for public inspection per our instructions in the **ADDRESSES** section of the preamble.

Response: As noted, the Colorado 2015 ozone infrastructure SIP was submitted to the EPA on September 17, 2018, following a public hearing held by the State on August 16, 2018. Subsequently, on September 17, 2019, Colorado supplemented its submission and transmitted CBD's original comment and exhibits to the EPA (available in the docket to this action).

After reviewing the comment, exhibits, and audio file of the AQCC hearing, the EPA concludes that CBD's comment fails to demonstrate that the State's public comment period was not adequate. On the date of the hearing, CBD sent an email to the State, commenting, in relevant part, "Attached are two papers I intend to discuss in my comments today on the proposed good neighbor SIP for the 2015 ozone NAAQS." The email contained two exhibits: an article titled "Unexpected slowdown of US pollutant emission reduction in the past decade" and an article titled "Agriculture is a major source of NO_x pollution in California." At the hearing, CBD asserted that the AQCC must consider the two reports. The first report, according to CBD, "finds that the reductions of NO_x"—an ozone precursor—"are becoming much slower than what was predicted." Thus, CBD concludes, the AQCC must "take that into account." The second report concerns NO_x emissions from agricultural fertilizer in California. While CBD acknowledges that the report addresses California, CBD claims the AQCC must determine whether agricultural emissions are adequately accounted for "in all relevant states."

The commenter had the opportunity, at the public hearing, to explain the significance of the documents it submitted to support its oral comments and, the commenter did so. The audio record of the hearing indicates that a commissioner of the AQCC stated that because the commenter had submitted the documents shortly before the hearing, the AQCC had not had a chance to look at them. Nevertheless, a commissioner of the AQCC invited a response from "staff" to the issues raised by the commenter at the hearing. In response, a representative from

the APCD stated, in part, that its interstate transport SIP submission is not designed to address other states' contributions to Colorado's nonattainment areas. A second state representative explained that Colorado's "highest value is at 0.33 [ppb of ozone?], which is less than half of the value that is deemed significant" and there would need to be a "dramatic change" to show that Colorado was significantly contributing to another state. These statements indicate that the State did consider the commenters' concerns at the public hearing, even if the State disagreed with the commenter and the relevance of the submitted documents.

CAA section 110(a) requires that each state provide "reasonable notice and public hearing" in connection with SIP submissions. The EPA's regulations further require, in part, that states provide notice and the opportunity to submit written comments. 40 CFR 51.102. Under the specific circumstances, here, although Colorado's response to the comment was not robust, the commenter has not demonstrated that Colorado's public hearing was not adequate, nor that Colorado had failed to provide an opportunity to submit comments. Despite being provided the opportunity to explain the significance of the submitted documents (either orally or in writing), the commenter's remarks about the significance of the documents were brief and general.² The AQCC did not ignore the commenter, but provided the commenter with an opportunity to explain concerns based on the submitted documents, apparently attended to that explanation, and invited (and received) input from APCD staff concerning the material submitted by the commenter. The commenter's suggestion that the remarks by APCD staff were speculative and meaningless and that it was necessary for Colorado to re-run modeling based on the submitted

² It is worth noting that the commenter, in submitting comments in response to the NPRM, did not submit to the EPA the papers it had tendered to the AQCC and it made only passing reference to exhibits it had submitted to the AQCC. The commenter made no attempt to meaningfully discuss the exhibits or clearly explain the significance of the material.

documents is not adequately supported.³ Under the circumstances, including the commenter's very limited explanation concerning the significance of the documents submitted at the hearing, the input from APCD staff at the hearing, and the apparent nature of the documents (including that they were prepared in other contexts and not directly germane to the SIP submission at issue), Colorado not conducting additional photochemical grid modeling based on a general request to take the reports "into account" was reasonable. Given the lack of specificity in CBD's comments and with respect to the significance of the submitted documents, the agency does not agree that the public comment opportunity provided by Colorado was not adequate. It is a commenter's responsibility to make assertions with reasonable specificity during the public comment period.

Comment: Commenter asserts that the EPA must disapprove the CAA section 110(a)(2)(D)(i)(I) (interstate transport prongs 1 and 2) portion of Colorado's SIP for the 2015 ozone NAAQS because the proposed approval relied on the EPA's source-apportionment modeling for the year 2023 that was released with the EPA's March 2018 Memo.⁴ The commenter states that this modeling is not reliable because the "EPA is actively working to undo a number of major rules that underpin the 2023 modeling results." The commenter specifically cites the EPA's proposed repeal of the "Glider Rule" establishing emission requirements for glider vehicles, glider engines, and glider kits;⁵ the Department of Transportation's National Highway Traffic Safety Administration (NHTSA) proposed repeal of the Corporate Average

³ The commenter "cannot undermine" a model simply by "pointing to variable not taken into account that might conceivably have pulled the analysis's sting." *Appalachian Power v. EPA*, 135 F.3d 791, 805 (D.C. Cir. 1998). CBD must show how that failure "would have a significant effect" on the outcome. *Id.*

⁴ See "Information on the Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I)," (Mar. 27, 2018), available in the docket for this action or at <https://www.epa.gov/interstate-air-pollution-transport/interstate-airpollution-transport-memos-and-notices>.

⁵ See "Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits" 82 FR 53442 (Nov. 16, 2017).

Fuel Economy (CAFE) standards for light-duty vehicles and the EPA's simultaneous proposed repeal of vehicle Greenhouse Gas (GHG) standards;⁶ and the proposed withdrawal the Control Techniques Guidelines (CTG) for the oil and gas industry.⁷ The commenter also cites the repeal of the Clean Power Plan and its replacement with the "more-polluting" Affordable Clean Energy (ACE) rule. The commenter states that all of these actions "erode the accuracy of EPA's 2023 modeling projections and further demonstrates the arbitrariness of EPA's reliance on that modeling to approve Colorado's Good Neighbor provision." The commenter asserts that reliance on the modeling is arbitrary with regard to both steps 1 and 2 of the EPA's analysis because it underestimates values at downwind receptors as well as Colorado's contributions to those receptors.

The commenter also states that the EPA's 2023 modeling projections failed to account for non-air quality regulations that had been rolled back, stating without reference "both the coal combustion waste and the steam electric effluent limitation guidance rules" and "state level bailouts for dirty sources of pollution, like in Ohio." The commenter states that "these rollbacks are designed to make dirty forms of energy more economic so that they are dispatched more, which results in more pollution."

Response: The EPA disagrees with the commenter that its 2023 modeling projections are unreliable because of potential changes to other regulations. The EPA first notes that the Agency has not finalized proposed regulatory changes to the Glider Rule or the oil and gas CTG. The EPA's normal practice is to only include changes in emissions from final regulatory actions in its

⁶ See "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks," 83 FR 42986 (Aug. 24, 2018).

See "2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards," 77 FR 62624, 62899-900 (Oct. 15, 2012).

⁷ See "Notice of Proposed Withdrawal of the Control Techniques Guidelines for the Oil and Natural Gas Industry," 83 FR 10478 (Mar. 9, 2018).

modeling because, until such rules are finalized, any potential changes in NO_x or VOC emissions are speculative.

The EPA did finalize a portion of the revisions to the CAFE standards for light duty vehicles, specifically the withdrawal of the waiver the agency had previously provided to California for its GHG and Zero Emissions Vehicle programs under section 209 of the CAA.⁸ This final action does not have any impact on Colorado’s modeled 2023 emissions. The model year 2017-2025 GHG regulations for cars and light trucks were projected to yield small but measurable criteria and toxic emissions reductions from vehicles. Because the vehicles affected by the 2017-2025 GHG standards would still need to meet applicable criteria pollutant emissions standards (*e.g.*, the Tier 3 emissions standards; 79 FR 23414), the regulatory impact analysis that accompanied the proposed revision to the GHG standards estimated a very limited impact on criteria and toxic pollutant emissions (increases in upstream emissions⁹ and decreases in tailpipe emissions). Moreover, the proposed SAFE Vehicles Rule specifically notes that none of the regulatory alternatives considered “would noticeably impact net emissions of smog-forming or other ‘criteria’ or toxic air pollutants.” 83 FR 42996. Although on September 19, 2019, the EPA signed a final rule withdrawing a waiver for the State of California’s GHG and zero emissions vehicle programs under CAA section 209, the EPA has not yet acted on the regulatory alternatives identified in the proposed SAFE Vehicles Rule.¹⁰ In general, the mobile source and non-EGU emissions inventories do not reflect changes in emissions resulting from rulemakings

⁸ See “The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program,” 84 FR 51310 (Sep. 27, 2019).

⁹ In this context, “upstream emissions” refer to the estimated emissions attributed to the extraction and transportation of crude oil, refining of crude oil, and distribution and storage of finished gasoline. See the NPRM for “The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program,” at 83 FR 42986, August 24, 2018.

¹⁰ See prepublication version of The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule (signed September 19, 2019).

finalized in calendar year 2016 or later, nor do they reflect any rules proposed but not yet finalized since 2016, as only finalized rules are reflected in modeling inventories.

Further, the commenter has not demonstrated that the potential changes to nationally applicable rules noted by the commenter might reasonably be expected to impact Colorado's modeled contributions to projected downwind nonattainment and maintenance receptors, to the degree that Colorado sources might contribute significantly to nonattainment or interfere with maintenance at any of these receptors. In the 2011 Cross-State Air Pollution Rule (CSAPR) and the 2016 CSAPR Update, the EPA used a threshold of one percent of the NAAQS (0.7 ppb of ozone) to determine whether a given upwind state was "linked" at step 2 of the four-step framework and would therefore contribute to downwind nonattainment and maintenance sites identified in step 1. If a state's impact did not equal or exceed the one percent threshold, the upwind state was not "linked" to a downwind air quality problem, and on this basis the EPA concluded the state will not significantly contribute to nonattainment or interfere with maintenance of the NAAQS in the downwind states.

As stated in the NPRM, the EPA's updated 2023 modeling, discussed in the March 2018 Memo, indicates that Colorado's largest impacts on any potential downwind nonattainment and maintenance receptor in the United States are 0.33 ppb and 0.27 ppb, respectively. These values are less than half of 0.70 ppb, or the value equivalent to one percent of the 2015 ozone NAAQS.¹¹ The commenter has not provided any information to demonstrate how ozone precursor emissions from sources located in Colorado might be expected to increase in such a way as to cause Colorado's projected impact to approach a 0.70 ppb contribution at any

¹¹ Because none of Colorado's impacts to nonattainment or maintenance receptors exceed 0.70 ppb, they necessarily also do not exceed the 1 ppb contribution threshold discussed in the EPA's memorandum "Analysis of Contribution Thresholds for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards," (Aug. 31, 2018).

downwind receptor. Therefore, the EPA disagrees with the commenter that the EPA’s 2023 modeling projections cannot be relied upon to conclude that emissions from Colorado will not significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in any other state.

The commenter also has not demonstrated that the potential changes to nationally applicable rules noted by the commenter might reasonably be expected to cause our 2023 modeling analysis to underestimate values at downwind receptors, and specifically to underestimate these values in such a way that would cause receptors to which Colorado contributes above 0.70 ppb to be considered nonattainment and/or maintenance in 2023. Table 1 below lists the downwind receptors in the 2023 modeling to which Colorado was projected to contribute above 0.70 ppb. As shown, none of these downwind receptors is projected to come near the nonattainment or maintenance level of 71.0 ppb. For this reason, even if downwind receptor 2023 projections were expected to increase (which we do not anticipate), such increases would be very unlikely to convert these receptors to nonattainment or maintenance for the 2015 ozone NAAQS.

Table 1. Downwind State Receptors with Colorado Contributions above 0.70 ppb

Site ID	State	2023 Avg DV	2023 Max DV	2023 CO Contribution
560210100	Wyoming	62.4	62.4	7.99
350451005	New Mexico	55.3	57.0	2.04
350450009	New Mexico	56.7	59.0	1.24
460930001	South Dakota	52.0	53.3	1.13
350450018	New Mexico	62.0	62.0	1.00
560050123	Wyoming	59.3	60.5	0.80
400159008	Oklahoma	61.2	63.1	0.71
201730010	Kansas	61.9	63.2	0.70

Regarding the commenter's assertion that the EPA's 2023 modeling projections failed to account for non-air quality related "rules" and "bailouts,"¹² the EPA finds that the commenter has failed to provide any data or other information to show how these actions "would have a significant effect" on the EPA's modeling results.¹³ Based on this particular comment's lack of both context and information, the EPA finds that the comment does not present evidence that the EPA's 2023 modeling projections are not a sufficient basis for the EPA to conclude that Colorado does not significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in the downwind states.

Comment: Commenter asserts that the EPA's reliance on the 2023 modeling projections from the March 2018 Memo was inappropriate because the Marginal attainment date for the 2015 ozone NAAQS falls before 2023, and "most of the downwind areas are marginal nonattainment areas." The commenter explains that the EPA's use of the attainment date for Moderate areas is contrary to the good neighbor provision of section 110(a)(2)(D)(i)(I), as well as the CAA requirements for expeditious attainment of the NAAQS. Thus, the commenter concludes that the EPA must use a date in its future year modeling analysis no later than the attainment date for marginal nonattainment areas, which would both increase the number of nonattainment and maintenance receptors and increase Colorado's contribution to those receptors.

¹² As noted, the commenter did not provide references for any of these actions (other than an oblique reference to "like in Ohio"), and the EPA therefore lacks the context necessary to accurately describe them.

¹³ See *Appalachian Power v. EPA*, 135 F.3d at 805: "The party challenging the use" of, in this case, an air quality modeling analysis, "must identify clearly major variables the omission of which renders the analysis suspect," including "data to support the assertion that additional factors ... would have a significant effect" on the modeling results.

Response: The EPA disagrees with the commenter that it is inappropriate to rely on the EPA's modeling from the March 2018 Memo because our 2023 projections are aligned with the Moderate rather than Marginal attainment date for the 2015 ozone NAAQS. The EPA further notes that, even if it were appropriate to evaluate downwind air quality and upwind contributions consistent with the Marginal area attainment date of 2021, Colorado's impacts on these areas in 2021 would be similar to those projected in 2023, as detailed further below. EPA modeling in support of the CSAPR Update Rule for the 2008 ozone NAAQS projected that Colorado's largest impact to any downwind nonattainment or maintenance receptor in 2017 was 0.31 ppb.¹⁴ As noted, in the March 2018 Memo we projected a maximum impact of 0.33 ppb to any downwind nonattainment or maintenance receptor in 2023. Both of these maximum impacts were projected at the same receptor in Tarrant County, Texas. To estimate Colorado's maximum contribution to a potential nonattainment or maintenance receptor in 2021, the EPA used a linear interpolation which calculated the average contribution from Colorado to the Tarrant County receptor using the underlying daily 2023 contribution data for the same days that were used to calculate the average contribution for 2017. Specifically, the 2017 contribution analysis included 5 days and we used the daily contributions from these same 5 days to calculate the Transport Future Year 2023 average contribution. Using this consistent methodology, the contribution from Colorado to the Tarrant County receptor in 2023 is 0.3135 ppb, virtually unchanged from the 0.3137 ppb contribution modeled in 2017. The EPA calculated the linear rate of decline for contribution from Colorado to the Tarrant County receptor to calculate a 2021 contribution of 0.3136 ppb.¹⁵ Based on this analysis, the EPA finds it reasonable to conclude that Colorado

¹⁴ See the EPA's "Air Quality Modeling Technical Support Document for the Final Cross State Air Pollution Rule Update" (August 2016), in the docket for this action.

¹⁵ A spreadsheet with the calculations from this linear interpolation is included in the docket for this action.

impacts to downwind nonattainment and maintenance receptors in any years between 2017 and 2023, including 2021, would also be projected to be well below 0.70 ppb.

The EPA also believes that 2023 is an appropriate year for analysis of good neighbor obligations for the 2015 ozone NAAQS because the 2023 ozone season is the last relevant ozone season during which achieved emissions reductions in linked upwind states could assist downwind states with meeting the August 2, 2024 Moderate area attainment date for the 2015 ozone NAAQS. The EPA recognizes that the attainment date for nonattainment areas classified as Marginal for the 2015 ozone NAAQS is August 2, 2021, which currently applies in several nonattainment areas downwind of Colorado evaluated in the EPA's modeling.¹⁶ The EPA is further cognizant of the D.C. Circuit's September 13, 2019 decision in *Wisconsin v. EPA*. 938 F.3d 303. In this ruling, the court addressed legal challenges to the CSAPR Update, in which the EPA partially addressed certain upwind states' prongs 1 and 2 obligations for the 2008 ozone NAAQS. While the court generally upheld the rule as to most of the challenges raised in the litigation, the court remanded the CSAPR Update to the extent it failed to require upwind states to eliminate their significant contributions in accordance with the attainment dates found in CAA section 181 by which downwind states must come into compliance with the NAAQS. *Id.* at 313. However, as explained below, the EPA does not believe that either the statute or applicable case law requires the evaluation of good neighbor obligations in a future year aligned with the attainment date for nonattainment areas classified as Marginal.

The good neighbor provision instructs the EPA and states to apply its requirements "consistent with the provisions of" title I of the CAA. CAA section 110(a)(2)(D)(i); *see also*

¹⁶ The Marginal area attainment date is not applicable for nonattainment areas already classified as Moderate or higher, such as the New York Metropolitan Area. For the status of all nonattainment areas under the 2015 ozone NAAQS, see U.S. EPA, 8-Hour Ozone (2015) Designated Area/State Information, <https://www3.epa.gov/airquality/greenbook/jbtc.html> (last updated Sept. 30, 2019).

North Carolina v. EPA, 531 F.3d 896, 911–12 (D.C. Cir. 2008). This consistency instruction follows the requirement that plans “contain adequate provisions prohibiting” certain emissions in the good neighbor provision. As the D.C. Circuit held in *North Carolina*, and more recently in *Wisconsin*, the good neighbor provision must be applied in a manner consistent with the designation and planning requirements in title I that apply in downwind states and, in particular, the timeframe within which downwind states are required to implement specific emissions control measures in nonattainment areas and submit plans demonstrating how those areas will attain, relative to the applicable attainment dates. *See North Carolina*, 896 F.3d at 912 (holding that the good neighbor provision’s reference to title I requires consideration of both procedural and substantive provisions in title I); *Wisconsin*, 938 F.3d at 313-18.

While the EPA recognizes, as the court held in *North Carolina* and *Wisconsin*, that upwind emissions-reduction obligations therefore must generally be aligned with downwind receptors’ attainment dates, unique features of the statutory requirements associated with the Marginal area planning requirements and attainment date under CAA section 182 lead the EPA to conclude that it is more reasonable and appropriate to require the alignment of upwind good neighbor obligations with later attainment dates applicable for Moderate or higher classifications. Under the CAA, states with areas designated nonattainment are generally required to submit, as part of their state implementation plan, an “attainment demonstration” that shows, usually through air quality modeling, how an area will attain the NAAQS by the applicable attainment date. *See* CAA section 172(c)(1).¹⁷ Such plans must also include, among other things, the adoption of all “reasonably available” control measures on existing sources, a demonstration of

¹⁷ Part D of title I of the Clean Air Act provides the plan requirements for all nonattainment areas. Subpart 1, which includes section 172(c), applies to all nonattainment areas. Congress provided in subparts 2-5 additional requirements specific to the various NAAQS pollutants that nonattainment areas must meet.

“reasonable further progress” toward attainment, and contingency measures, which are specific controls that will take effect if the area fails to attain by its attainment date or fails to make reasonable further progress toward attainment. *See, e.g.*, CAA section 172(c)(1); 172(c)(2); 172(c)(9). Ozone nonattainment areas classified as Marginal are excepted from these general requirements under the CAA—unlike other areas designated nonattainment under the Act (including for other NAAQS pollutants), Marginal ozone nonattainment areas are specifically exempt from submitting an attainment demonstration and are not required to implement *any* specific emissions controls at existing sources in order to meet the planning requirements applicable to such areas. *See* CAA section 182(a) (“The requirements of this subsection shall apply in lieu of any requirement that the State submit a demonstration that the applicable implementation plan provides for attainment of the ozone standard by the applicable attainment date in any Marginal Area.”)¹⁸ Marginal ozone nonattainment areas are also exempt from demonstrating reasonable further progress towards attainment and submitting contingency measures. *See* CAA section 182(a) (does not include a reasonable further progress requirement and specifically notes that “Section [172(c)(9)] of this title (relating to contingency measures) shall not apply to Marginal Areas”).

Existing regulations—either local, state, or Federal—are typically a part of the reason why “additional” local controls are not needed to bring Marginal nonattainment areas into attainment. As described in the EPA’s record for its final rule defining area classifications for the 2015 ozone NAAQS and establishing associated attainment dates, history has shown that the

¹⁸ States with Marginal nonattainment areas are required to implement new source review permitting for new and modified sources, but the purpose of those requirements is to ensure that potential emissions increases do not interfere with progress towards attainment, as opposed to reducing existing emissions. Moreover, the EPA acknowledges that states within ozone transport regions must implement certain emission control measures at existing sources in accordance with CAA section 184, but those requirements apply regardless of the applicable area designation or classification.

majority of areas classified as Marginal for prior ozone standards attained the respective standards by the Marginal area attainment date (*i.e.*, without being re-classified to a Moderate designation). 83 FR 10376. As part of a historical lookback, the EPA calculated that by the relevant attainment date for areas classified as Marginal, 85 percent of such areas attained the 1979 1-hour ozone NAAQS, and 64 percent attained the 2008 ozone NAAQS. *See* Response to Comments, section A.2.4.¹⁹ Based on these historical data, the EPA expects that many areas classified Marginal for the 2015 ozone NAAQS will also attain by the relevant attainment date as a result of emissions reductions that are already expected to occur through implementation of existing local, state, and Federal emissions reduction programs. To the extent states have concerns about meeting their attainment date for a Marginal area, the CAA under section 181(b)(3) provides authority for them to voluntarily request a higher classification for individual areas, if needed.

Areas that are classified as Moderate typically have more pronounced air quality problems than Marginal areas or have been unable to attain the NAAQS under the minimal requirements that apply to Marginal areas. *See* CAA sections 181(a)(1) (classifying areas based on the degree of nonattainment relative to the NAAQS) and (b)(2) (providing for reclassification to the next highest designation upon failure to attain the standard by the attainment date). Thus, unlike Marginal areas, the statute explicitly requires a state with an ozone nonattainment area classified as Moderate or higher to develop an attainment plan demonstrating how the state will address the more significant air quality problem, which generally requires the application of various control measures to existing sources of emissions located in the nonattainment area. *See generally* CAA sections 172(c) and 182(b)-(e).

¹⁹ Available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0202-0122>.

Given that downwind states are not required to demonstrate attainment by the attainment date or impose additional controls on existing sources in a Marginal nonattainment area, the EPA believes that it would be inconsistent to interpret the good neighbor provision as requiring the EPA to evaluate the necessity for upwind state emissions reductions based on air quality modeled in a future year aligned with the Marginal area attainment date. Rather, the EPA believes it is more appropriate and consistent with the nonattainment planning provisions in title I of the Act to evaluate downwind air quality and upwind state contributions, and, therefore, the necessity for upwind state emissions reductions, in a year aligned with an area classification in connection with which downwind states are also required to demonstrate attainment and implement controls on existing sources — *i.e.*, with the Moderate area attainment date, rather than the Marginal area date. With respect to the 2015 ozone NAAQS, the Moderate area attainment date will be in the summer of 2024, and the last full year of monitored ozone-season data that will inform attainment demonstrations is, therefore, 2023.

The EPA's interpretation of the good neighbor requirements in relation to the Marginal area attainment date is consistent with the *Wisconsin* opinion. For the reasons explained below, the court's holding does not contradict the EPA's view that 2023 is an appropriate analytic year in evaluating good neighbor SIPs for the 2015 ozone NAAQS. The court in *Wisconsin* was concerned that allowing upwind emission reductions to be implemented after the applicable attainment date would require downwind states to obtain more emissions reductions than the Act requires of them, to make up for the absence of sufficient emissions reductions from upwind states. *See* 938 F.3d at 316. As discussed previously, however, this equitable concern only arises for nonattainment areas classified as Moderate or higher for which downwind states are required by the CAA to develop attainment plans securing reductions from existing sources and

demonstrating how such areas will attain by the attainment date. *See, e.g.*, CAA section 182(b)(1) & (2) (establishing “reasonable further progress” and “reasonably available control technology” requirements for Moderate nonattainment areas). Ozone nonattainment areas classified as Marginal are not required to meet these same planning requirements, and thus the equitable concerns raised by the *Wisconsin* court do not arise with respect to downwind areas subject to the Marginal area attainment date.

The distinction between planning obligations for Marginal nonattainment areas and higher classifications was not before the court in *Wisconsin*. Rather, the court was considering whether the EPA, in implementing its obligation to promulgate Federal implementation plans under CAA section 110(c), was required to fully resolve good neighbor obligations by the 2018 *Moderate* area attainment date for the 2008 ozone NAAQS. *See* 938 F.3d at 312-13. Although the court noted that petitioners had not “forfeited” an argument with respect to the Marginal area attainment date, *see id.* at 314, the court did not address whether its holding with respect to the 2018 *Moderate* area date would have applied with equal force to the Marginal area attainment date because that date had already passed. Thus, the court did not have the opportunity to consider these differential planning obligations in reaching its decision regarding the EPA’s obligations relative to the then-applicable 2018 *Moderate* area attainment date because such considerations were not applicable to the case before the court.²⁰ For the reasons discussed here, the equitable concerns supporting the *Wisconsin* court’s holding as to upwind state obligations

²⁰ The D.C. Circuit, in a short judgment, subsequently vacated and remanded the EPA’s action purporting to fully resolve good neighbor obligations for certain states for the 2008 ozone NAAQS, referred to as the CSAPR Close-Out, 83 FR 65878 (Dec. 21, 2018). *New York v. EPA*, No. 19-1019 (Oct. 1, 2019). That result necessarily followed from the *Wisconsin* decision, because as the EPA conceded, the Close-Out “relied upon the same statutory interpretation of the Good Neighbor Provision” rejected in *Wisconsin*. *Id.* slip op. at 3. In the Close-Out, the EPA had analyzed the year 2023, which was two years after the Serious area attainment date for the 2008 ozone NAAQS and not aligned with any attainment date for that NAAQS. *Id.* at 2. In *New York*, as in *Wisconsin*, the court was not faced with addressing specific issues associated with the unique planning requirements associated with the Marginal area attainment date.

relative to the Moderate area attainment date also support the EPA's interpretation of the good neighbor provision relative to the Marginal area attainment date. Thus, the EPA concludes that its reliance on an evaluation of air quality in the 2023 analytical year for purposes of assessing good neighbor obligations with respect to the 2015 ozone NAAQS is based on a reasonable interpretation of the CAA and legal precedent.

Comment: Commenter asserts that the EPA must disapprove the SIP under CAA section 110(a)(2)(E) (Adequate resources and authority) because the State of Colorado lacks adequate legal authority to regulate emissions from agriculture sources. The commenter quotes Colorado Revised Statutes 25-7-109(8)(a) to state that this provision prohibits Colorado from being able to protect visibility and air quality in Class 1 areas from agricultural sources. Furthermore, the commenter asserts that the EPA must disapprove the SIP under CAA sections 110(a)(2)(D) (interstate transport prong 4) and 110(a)(2)(J) (consultation with government officials, public notification, and PSD and visibility protection) because of visibility impairment caused by agricultural emissions. Finally, the commenter also calls on the EPA to disapprove the SIP under CAA section 110(a)(2)(A) (emissions limits and other control measures) by explaining the State is unable to maintain the NAAQS because Colorado lacks the authority to control emissions from agriculture and pesticides, "even if such sources are not major stationary sources"

Response: Colorado's infrastructure SIP submission confirms that "[t]here are no state or federal provisions prohibiting the implementation of any provision of the Colorado SIP." Specifically, Colorado cites to "general authority to adopt the rules and regulations necessary to implement the SIP" as "set out in the Colorado Air Pollution Prevention and Control Act Section 25-7-105 of the Colorado Revised Statutes (C.R.S.)," general authority to administer and enforce the program in 25-7-111, C.R.S, additional authority to regulate air pollution and implement

provisions in the SIP in the Colorado Air Pollution Prevention and Control Act, Article 7 of title 25, and authority delegated under Sections 42-4-301 through 42-4-316, C.R.S. (concerning motor vehicle emissions) and 42-4-414, C.R.S. (concerning emissions from diesel-powered vehicles).

The statutory provision cited by commenter does not bar the State from carrying out its existing SIP; indeed, the provision *requires* regulation of agricultural, horticultural, or floricultural production, certain animal feeding operations, and pesticide application “if they are ‘major stationary sources’, ... or are required by Part C (prevention of significant deterioration), Part D (nonattainment), or Title V (minimum elements of a permit program)” Whether Colorado will need additional emission limitations and other control measures for areas designated nonattainment for the 2015 ozone NAAQS will be reviewed and acted upon as part of the State’s attainment plan under CAA title I part D through a separate process at a later time.

While the EPA recognizes the commenter’s concern about the impact of agricultural and pesticide emissions, in the context of this rulemaking, the EPA does not find the State deficient in its ability to carry out its infrastructure SIP requirements.

CAA section 110(a)(2)(D)(i)(II) (interstate transport prong 4) generally requires a SIP to contain adequate provisions prohibiting emissions within the state from “interfering with measures required to be in the applicable implementation plan for any other State under part C of this subchapter ... to protect visibility.” Under the 2013 Infrastructure SIP guidance,²¹ a state’s infrastructure SIP submission may satisfy prong 4 through confirmation that the state has a fully-approved regional haze SIP. The EPA approved Colorado’s Regional Haze SIP for the first implementation period for regional haze on December 31, 2012 (77 FR 76871), which the State

²¹ “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.

identified to demonstrate that Colorado does not interfere with visibility in any other state. The EPA subsequently approved an update to Colorado's Regional Haze SIP on July 5, 2018, meaning that the Colorado Regional Haze SIP for the first implementation period remains fully approved (83 FR 31332). Accordingly, this is a sufficient basis on which to approve the State's prong 4 submittal here.

With respect to CAA section 110(a)(2)(J) (consultation with government officials, public notification, and PSD and visibility protection), the EPA also disagrees with the commenter. Section 110(a)(2)(J) visibility requirements do not need to be addressed in this rulemaking because a state's requirements relating to visibility protection are not affected when the EPA establishes or revises a NAAQS. As the EPA noted in the 2013 Infrastructure SIP guidance, when the EPA establishes or revises a NAAQS, the visibility requirements under Part C of title I of the CAA do not change. There are no new visibility protection requirements under Part C as a result of the revised NAAQS. Accordingly, air agencies do not need to address the visibility sub-element of Element J in an infrastructure SIP submission.

The EPA recognizes the concern for meeting visibility requirements. However, Colorado has a fully approved regional haze SIP for the first implementation period, and the EPA and states, including Colorado, along with various stakeholders have been engaged in an ongoing process of developing SIPs for the second implementation period under the regional haze regulations, 40 CFR part 51, subpart P, which are due to the EPA by July 31, 2021.

Comment: Commenter asserts that the EPA must disapprove the SIP under CAA sections 110(a)(2)(E)(i) and 110(a)(2)(L) stating that in the NPRM, the EPA fails to provide analyses that prove Colorado's resources are adequate. Commenter believes Colorado lacks adequate funding because the State "has missed the statutory deadline to make a final decision" on renewal

applications for “dozens of Title V facilities” (asserting that “Colorado does not have the resources to hire enough title V permit writers.” Moreover, commenter assumes Colorado lacks adequate resources to enforce its air program because the State “has approximately 9 inspectors to inspect ... 50,000 plus oil and gas wells.” Commenter believes Colorado’s “Taxpayer Bill of Rights” (TABOR) amendment operates as a legal impediment to the State’s budget that impacts its ability to implement the SIP.

Response: The EPA disagrees with the commenter’s conclusions concerning the adequacy of the Colorado infrastructure SIP with respect to both CAA sections 110(a)(2)(E)(i) and (L). As stated in the NPRM, CAA section 110(a)(2)(E)(i) requires that each SIP provides, in part, “necessary assurances that the State ... will have adequate personnel, funding, and authority under State ... law to carry out such implementation plan” and CAA section 110(a)(2)(L) requires that each state have a permit fee program (although the requirement is suspended when the EPA approves the state’s title V fee program, which does not need to be approved into the SIP).

With respect to CAA section 110(a)(2)(E)(i), the EPA evaluates the submitting state’s infrastructure SIP submission for evidence that the state has adequate resources. Element E does not require an audit of resources or personnel. As stated in the NPRM for this action, Colorado’s infrastructure SIP submission for the 2015 ozone NAQMS indicated that “[t]he Division has staff and annual budget to operate its six programs (Stationary Sources, Mobile Sources, Indoor Environment, Technical Services, Planning and Policy, Administrative Services).” Further, the Division employed 176 people and had a budget of about \$18 million for fiscal year 2018. Of the total budget, about 17 percent was derived from Federal grants, 30 percent from mobile source fees, 50 percent from stationary source fees, and 3 percent from other cash sources. These budget

and staff levels have been consistent over the past number of years and over these years Colorado has been able to meet its statutory commitments, including submitting the required air quality data, attainment plans, and monitoring networks.²²

Commenter expresses specific concerns that Colorado “has approximately 9 inspectors to inspect its 50,000 plus oil and gas wells,” and concludes from this that the State “lacks the resources to adequately enforce its air program.” In general, the EPA believes that questions about the specific number of inspectors needed in a given state involve the issue of enforcement discretion and are thus within the state’s discretion, within reason. The EPA notes that it does not require physical inspection of every stationary source of emissions. The EPA’s stationary source compliance monitoring guidance explains that states are encouraged to use a variety of techniques to determine compliance, including, for example, on-site compliance evaluations and off-site record reviews.²³ Furthermore, state choices such as focusing resources on and targeting inspections to larger sources (such as title V major stationary sources) are consistent with the EPA’s inspection guidance, which calls for more frequent inspections of larger sources but does not specify an inspection frequency for smaller sources. And though commenter asserts that there are “50,000 plus oil and gas wells” in Colorado, commenter does not differentiate between smaller sources (or even inactive wells) and major stationary sources, which must be permitted in accordance with the CAA. Indeed, a recent report suggests that only 11,000 of those wells are “permitted” wells.²⁴ Because the report does not specify the type of permit that the State issued

²² See, e.g., 76 FR 43906 (July 22, 2011) (EPA-R08-OAR-2009-0809-004 for FY2006); 78 FR 58186 (Sept. 23, 2013) (EPA-R08-OAR-0810-0002 for FY2009); 80 FR 50205 (Aug. 19, 2015) (EPA-R08-OAR-2012-0972-0002 for FY2011); 82 FR 39030 (Aug. 17, 2017) (EPA-R08-OAR-2013-0557-0004 for FY2012 and EPA-R08-OAR-2013-0557-0002 for FY2014).

²³ CAA Stationary Source Compliance Monitoring Strategy (October 4, 2016), *available at* <https://www.epa.gov/sites/production/files/2013-09/documents/cmsspolicy.pdf>. The EPA’s guidance even notes that some regulated facilities may not require an on-site visit to assess compliance, such as gas-fired compressor stations.

²⁴ <https://www.denverpost.com/2019/04/21/colorado-air-pollution-oil-gas-sites/>.

(*e.g.*, whether the permitted source is a major source or a minor source), in evaluation of this comment the EPA has reviewed the Colorado's title V operating permits database²⁵ and identified only one permit for an oil and gas production facility.²⁶ Although the State issued numerous permits (but fewer than 60) for compressor stations that may be located at or near a well-site, such sources may not necessitate a site-visit to assess compliance.²⁷ Accordingly, commenter's assertion does not, at this juncture, contravene Colorado's assurance that the State has adequate resources and personnel to carry out its SIP. Accordingly, the EPA concludes that Colorado's Infrastructure SIP submission provides the necessary assurances that the State has the staffing and resources needed to meet its SIP obligations in accordance with section 110(a)(2)(E) of the CAA.

Commenter's reliance on the alleged title V permit backlog and perceived shortage of inspectors are not determinative. While the agency agrees that permitting delays are problematic, such delays are not necessarily evidence of insufficient state resources that rise to the level of an inability to implement the requirements of a SIP. In addition, approved title V programs are not a component of a state's SIP and such programs, therefore, are not part of the requirements that states must address in the context of an Infrastructure SIP submission.

Commenter also fails to explain why Colorado's submission does not satisfy CAA section 110(a)(2)(L) and, indeed, fails to acknowledge that Colorado has an EPA-approved fee program under title V (see 65 FR 49919). To the extent commenter alleges that Colorado is not adequately administering and enforcing its title V program, the EPA's review and approval of an

²⁵ <https://www.colorado.gov/pacific/cdphe/operating-permits-company-index>.

²⁶ See SandRidge Exploration and Production Company – Bighorn Pad, https://drive.google.com/drive/folders/1YqoDMY5a0jSZaMOV8qBNPFh_32CLwQnv.

²⁷ CAA Stationary Source Compliance Monitoring Strategy, at 6.

infrastructure SIP is not the appropriate time to raise those issues. Instead, CAA section 502(i) authorizes the Administrator to consider such allegations.

Lastly, commenter's general concern with respect to Colorado's constitutional amendment does not provide an adequate basis to disapprove Colorado's SIP with respect to CAA sections 110(a)(2)(E)(i) or 110(a)(2)(L). Commenter provides no explanation as to how the TABOR undermines Colorado's assurances that the State will have adequate personnel, funding, and authority to carry out its SIP or invalidates the EPA-approved fee program under title V.

Comment: Commenter asserts that the EPA must disapprove all of the PSD related infrastructure elements (*i.e.*, 110(a)(2)(C), (D)(i) (prong 3) and (J)) because of the State's "90 day timing rule." The commenter explains that the rule allows major stationary sources to construct "without a PSD or NNSR [*sic*] permit" in violation of the CAA.

Response: Although commenter does not offer a citation to a "90 day timing rule," the EPA believes commenter intended to refer to AQCC Regulation No. 3, Part A, Sec. II.D.1.III (Exemptions from Air Pollutant Emission Notice Requirements: oil and exploration and production operations). That rule requires owners or operators of oil and gas exploration and production operations to file an Air Pollution Emission Notice (APEN) no later than ninety days following the first day of production "[i]f production will result in reportable emissions." Commenter presumably believes that because an APEN need not be filed until after production begins, this rule exempts major stationary sources from new source review permitting (*i.e.*, PSD or NNSR).

The EPA believes commenter may be misunderstanding AQCC regulations and, accordingly, disagrees with commenter's conclusion. AQCC Regulation 3, Part A, Sec. II addresses Colorado's APEN requirements. Under that program, "no person shall allow emission

of air pollutants from, or construction, modification or alteration of, any facility, process, or activity which constitutes a stationary source, except residential structures, from which air pollutants are, or are to be, emitted unless and until” an APEN has been filed with the Division. *See* AQCC Regulation 3, Part A, Sec. II.A. Each APEN must specify the location at which the proposed emission will occur and provide certain details concerning the facility, process, or activity, including an estimate of the quantity and composition of the expected emission, among other information. *Id.*

If a source is exempted from the filing of an APEN under Part A, such sources may also be exempted from the State’s construction permit program under Part B. *See* AQCC Regulation 3, Part B, Sec. II.D.1.a. However, Colorado’s Part B construction permit program is not the State’s EPA-approved major source new source review program, which is found in AQCC Regulation 3, Part D. This may be the source of commenter’s misunderstanding. AQCC Regulation 3, Part B is clear that “[p]ermit exemptions taken under this section do not affect the applicability of any State or Federal regulations that are *otherwise applicable* to the source.” *See* AQCC Regulation 3, Part B, Sec. II.D. Thus, otherwise applicable permitting requirements in Regulation 3, Part D are not affected by the exemptions in Part B.

Furthermore, AQCC Regulation 3, Part A, Sec. II.D.1 also expressly states that any source that is exempt from filing an APEN “must nevertheless comply with all requirements that are otherwise applicable ... including, but not limited to: Title V, Prevention of Significant Deterioration, nonattainment New Source Review, opacity limitations, odor limitations, particulate matter limitations and volatile organic compounds controls.” Further, AQCC Regulation 3, Part D (Colorado’s major stationary source new source review and PSD program) expressly states that “[a]ny new major stationary source or major modification, to which the

requirements of this Part D apply, shall not begin actual construction in a nonattainment, attainment, or unclassifiable area unless a permit has been issued containing all applicable state and federal requirements.” AQCC Regulation 3, Part D, Sec. I.A.1. Accordingly, the EPA disagrees with commenter’s allegation that the “90-day timing rule” allows major stationary sources to construct without a PSD or NNSR permit in violation of the CAA.

North Dakota Comment and Response

Comment: The DRC submitted a comment letter and supporting documentation to the EPA on August 28, 2019, in which the DRC raises concerns that North Dakota’s SIP does not adequately regulate VOC emissions for upstream oil and gas industry operations, and therefore the State risks future ozone nonattainment status. Specifically, the DRC contends that the North Dakota infrastructure SIP submittal is deficient because oil and gas activities “are not covered by North Dakota’s minor source permitting program.” The DRC asserts that while oil and gas production facilities are required to file registration notices, these sources are otherwise exempt from permitting. The DRC explains that upstream oil and gas facilities have a significant emissions impact (pointing to the EPA’s 2014 National Emissions Inventory) and will continue to grow over the coming years. The DRC believes North Dakota has failed to aggregate emissions from production facilities because of a lack of personnel and funding (contrary to CAA section 110(a)(2)(E)). Accordingly, the DRC declares that the EPA has a mandatory duty to reject North Dakota’s SIP and issue a SIP call for a revised plan for its deficiencies under section 110(a)(2)(C).

Response: The EPA recognizes that the DRC is concerned that North Dakota’s minor NSR program exempts upstream oil and gas facilities from more rigorous permitting and believes North Dakota’s SIP should include mandatory emission limits, monitoring, and

recordkeeping for such sources. However, the EPA disagrees with the DRC's conclusion that the North Dakota infrastructure SIP submission for the 2015 ozone NAAQS is thereby deficient.

Section 110(a) of the CAA requires states to make SIP submissions to establish they already have, or are adding, the SIP infrastructure 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 the EPA may prescribe. Specifically, section 110(a)(1) provides the procedural and timing requirements for such SIPs (commonly referred to as infrastructure SIPs), and section 110(a)(2) lists specific elements that a state's infrastructure SIP must meet for a newly established or revised NAAQS. These requirements include 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. Consequently, the EPA considers action on infrastructure SIP submissions required by sections 110(a)(1) and (2) to be an exercise to assure that a state's SIP meets the basic structural requirements for the new or revised NAAQS.

For example, EPA's review of infrastructure SIP submissions with respect to the PSD program requirements in section 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 construction and modification of major sources and all regulated NSR pollutants, including greenhouse gases, in accordance with the requirements of the EPA's PSD regulation at 40 CFR 51.166.

Similarly, section 110(a)(2)(C), includes, among other things, the requirement that states have a program to regulate construction of minor new sources, but the EPA's regulations provide states with more discretion than the EPA's PSD regulations as to which sources must be covered

by such a program. Thus, to satisfy the sub-element for preconstruction regulation of the modification and construction of *minor* stationary sources and the *minor modification* of major stationary sources, an infrastructure SIP submission should identify the existing EPA-approved SIP provisions and/or include new provisions that govern the minor source pre-construction program that regulates emissions of the relevant NAAQS pollutant(s). The EPA's rules addressing SIP requirements for such programs are at 40 CFR 51.160 through 51.614. The EPA's focus in the infrastructure SIP context is on evaluation of 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, therefore, the EPA does not think it is necessary to re-review 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 the EPA's regulations that pertain to such programs.²⁸ We have previously found that North Dakota's program meets all minor new source review permitting requirements set forth at 40 CFR 51.160 through 51.164, including the requirement that a SIP-approved minor source program specifically identify the types and sizes of facilities that will be subject to review (see 40 CFR 51.160(e)).

With respect to the North Dakota infrastructure SIP submission presently before us, the EPA reviewed the submission itself, and evaluated the text of its provisions for compliance with the relevant elements of section 110(a)(2). In the NPRM, the EPA explicitly evaluated the State's infrastructure SIP submission on a requirement-by-requirement basis and explained its views on the adequacy of the State's submission for purposes of meeting the applicable infrastructure SIP requirements. Specifically, we found that North Dakota has EPA-approved minor NSR and

²⁸ See, e.g., 82 FR 22082, May 12, 2017 (final rule); 82 FR 39090, August 17, 2017 (proposed rule); 80 FR 13315, March 13, 2015 (proposed rule).

major NSR permitting programs, which regulate ozone precursors for the purposes of the 2015 ozone NAAQS. Accordingly, North Dakota's infrastructure SIP submission satisfies the general requirement in section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of stationary sources as necessary to assure the maintenance and attainment of the NAAQS. *See* 2013 Infrastructure SIP guidance at page 24.

Nevertheless, the EPA appreciates and takes seriously the DRC's concern and assertions that North Dakota's minor NSR permitting program may not adequately capture upstream oil and gas emissions, and that the aggregate emissions from the oil and gas industry may interfere with attainment and maintenance of the 2015 ozone NAAQS now or in the future. However, these concerns are best addressed outside the context of an infrastructure SIP action. The EPA has previously explained, as part of infrastructure SIP approvals, that EPA does not need to reconsider whether it should have approved or disapproved a state's existing minor NSR program.²⁹ The statutory requirements of CAA section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs. Furthermore, states have some discretion with respect to sources that are subject to minor NSR permitting requirements, and the EPA has previously approved the States' exercise of that discretion with regard to their minor NSR programs.³⁰ A detailed re-review of how the State has chosen to exercise this discretion is not needed in the context of an infrastructure SIP review to ensure that the minor NSR portion of a SIP meets basic structural requirements.

Because this action involves a review of the infrastructure SIP and North Dakota already has an approved minor source NSR program that covers the necessary pollutants, we have not

²⁹ *See, e.g.*, 77 FR 58957, September 25, 2012; 79 FR 62838, October 21, 2014; 84 FR 18187, April 30, 2019; 85 FR 55, January 2, 2020.

³⁰ *See, e.g.*, 76 FR 81373-76, Dec. 28, 2011.

conducted a detailed examination of the DRC's assertions concerning the perceived inadequate regulation of upstream oil and gas production facilities in the State's minor NSR program. The EPA understands that North Dakota's previously-approved regulations exempt certain oil and gas production facilities from needing a permit to construct (provided there is no Federal requirement for a permit or approval for construction or operation), but such sources are subject to registration and reporting requirements under North Dakota Administrative Code (NDAC) Chapter 33.1-15-20. That regulation requires registration forms to "contain sufficient information to allow the department to determine if the oil or gas well and associated production facility is in compliance with all applicable sections of this chapter," and mandates compliance with major source permitting under PSD for any oil or gas well production facility that is a major stationary source (or that has undertaken a major modification). Chapter 33.1-15-20-04 also contains requirements for the control of production facility emissions and specifically notes that "any volatile organic compound gas or vapor may be subject to controls as specified in chapter 33.1-15-07." Accordingly, upstream oil and gas production facilities are not wholly exempt from regulation in the State's SIP.

If the DRC believes these previously-approved provisions are substantively inadequate considering the nature of oil and gas operations in North Dakota, the DRC can petition the EPA to evaluate the merits of these assertions, separate from this action. We note that multiple statutory tools and avenues exist that the EPA can use to rectify potential deficiencies with a SIP and a state's implementation thereof, and the existence of these tools is consistent with the EPA's interpretation of section 110(a)(2) with respect to the EPA's role in reviewing infrastructure SIP submissions. For example, the CAA provides the EPA the authority to issue a SIP call, 42 U.S.C. 7410(k)(5); make a finding of failure to implement, *id.* sections 7410(m),

7509(a)(4); and take measures to address specific permits pursuant to the EPA's case-by-case permitting oversight. *See, e.g., id.* section 7661d(b). The appropriateness of employing these authorities depends on the nature and extent of the particular problems at issue; however, the public is encouraged to use such avenues and tools to provide the EPA with notice of any alleged problem or deficiency.

In the meantime, the EPA is finalizing its approval of the North Dakota infrastructure SIP submission that is currently before the EPA with respect to the general requirement in section 110(a)(2)(C). If the EPA was to later determine that the scope of the minor source permitting program administered by the State is not sufficient to protect the NAAQS, we could at that time take appropriate action to ensure those problems and deficiencies are rectified using whatever statutory tools are appropriate. The EPA is committed to working with states and the public to correct SIP deficiencies.

Finally, addressing the commenter's assertion that North Dakota has a deficiency pertaining to section 110(a)(2)(E), *i.e.* a lack of personnel and funding, given that the DRC has not provided any information to support this claim or to counter our prior analysis of the State's submittal with respect to section 110(a)(2)(E), we are approving this action in accordance with our analysis from the NPRM.

Comment: The DRC asserts that the North Dakota submittal has problematic ozone monitoring data, which "masks rising ozone pollution in North Dakota." The DRC also explains that they expect "that when the 2016 data falls away and is replaced by the 2019 data from this year, that North Dakota's 3-year average ozone emissions in western North Dakota will increase significantly." Accordingly, the DRC concludes that the EPA must "object to North Dakota's plan now, because this SIP is intended to carry North Dakota well into the future"

Response: The EPA disagrees with the DRC that North Dakota's submittal is erroneous, and we disagree that the monitoring data³¹ provided by the State disguises ozone data. The State's submission includes a time-series bar graph (without discrete values noted) showing nine distinct monitoring sites' ozone design values in increments of 5 parts per billion (ppb), beginning in 2003 and ending in 2017. The EPA notes that this State-provided graph³² depicts ozone design value data for monitoring sites, not annual fourth-highest daily maximum 8-hour average ozone concentration monitoring data. A design value is a statistical representation of the air quality status of a given location relative to the level of the NAAQS. The DRC has calculated its own data table in page three of their comment; the values that DRC has calculated correspond to the EPA's own truncated³³ data for annual fourth-highest daily maximum 8-hour average ozone concentration monitoring data. Although a design value for an ozone air quality monitoring site is related to the annual fourth-highest daily maximum 8-hour average ozone concentration (the design value being the rolling three-year average of that data), the values are not equivalent. The EPA has provided a table of design values that supports the graph provided by the State. *See* Table 2. Furthermore, the EPA has provided a graph (current to year 2018) of the ozone design value long-term trends for North Dakota; both Oliver County and Williams County are labeled as to their design value trends. *See* Graph 1. We also note that design values are typically used to designate and classify nonattainment areas, as well as to assess progress towards meeting the NAAQS. It should be noted that North Dakota has not violated the 2008 or 2015 ozone NAAQS, nor is North Dakota classified as nonattainment for the 2008 or 2015 ozone NAAQS; moreover, the trend lines in Graph 1 indicate generally that the design values for ozone

³¹ *See* North Dakota's 2015 ozone NAAQS submittal, attachment 2, "North Dakota Ozone Monitoring Data" at 21.

³² The original spreadsheet which North Dakota used to create the graph is included in the docket.

³³ *See* 40 CFR part 50, appendix I – Interpretation of the 8-Hour Primary and Secondary National Ambient Air Quality Standards for Ozone.

monitoring sites in North Dakota show a somewhat downward to level trend, excluding Oliver and Williams counties which show a slight upward trend.

While the EPA acknowledges that ozone monitoring data may change over time, such factors are not relevant to the EPA’s review of the State’s infrastructure SIP submission.

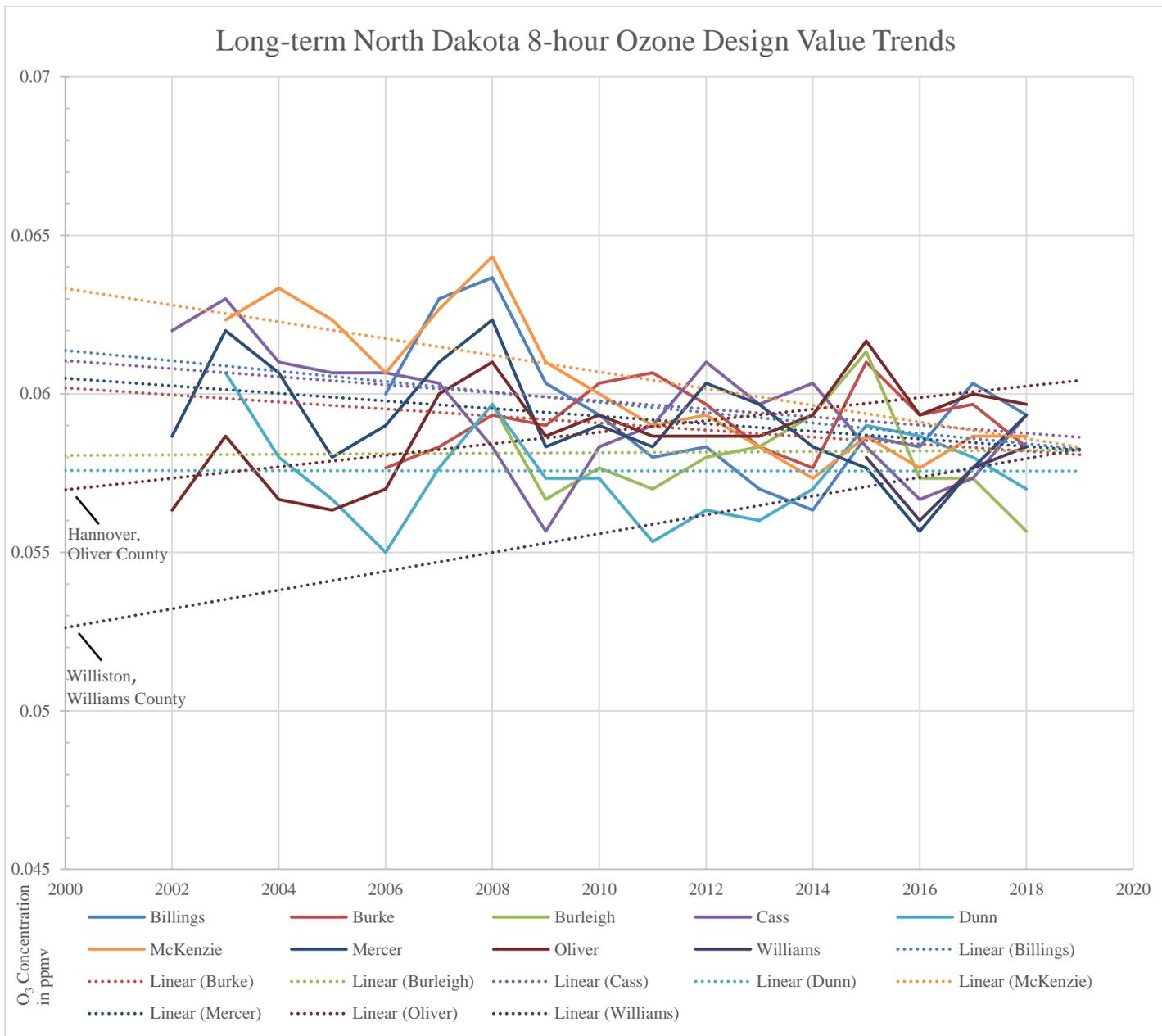
Table 2. Three-Year Average of Annual Fourth-Highest Daily Maximum 8-hour Average Ozone Concentration (Design Values).³⁴

Ozone Monitoring Site Design Values (ppm)										
Year	Billings	Burke	Burleigh	Cass	Dunn	McKenzie	Mercer	Oliver	Ward	Williams
2000										
2001										
2002	0.059			0.062			0.058	0.056		
2003				0.063	0.06	0.062	0.062	0.058		
2004				0.061	0.058	0.063	0.06	0.056		
2005				0.06	0.056	0.062	0.058	0.056		
2006	0.06	0.057		0.06	0.055	0.06	0.059	0.057		
2007	0.063	0.058		0.06	0.057	0.062	0.061	0.06		
2008	0.063	0.059	0.059	0.058	0.059	0.064	0.062	0.061		
2009	0.06	0.059	0.056	0.055	0.057	0.061	0.058	0.058		
2010	0.059	0.06	0.057	0.058	0.057	0.06	0.059	0.059		
2011	0.058	0.06	0.057	0.059	0.055	0.059	0.058	0.058		
2012	0.058	0.059	0.058	0.061	0.056	0.059	0.06	0.058		
2013	0.057	0.058	0.058	0.059	0.056	0.058	0.059	0.058		
2014	0.056	0.057	0.059	0.06	0.057	0.057	0.058	0.059		
2015	0.058	0.061	0.061	0.058	0.059	0.058	0.057	0.061		0.058
2016	0.058	0.059	0.057	0.056	0.058	0.057	0.055	0.059		0.056
2017	0.06	0.059	0.057	0.057	0.058	0.058	0.057	0.06		0.057
2018	0.059	0.058	0.055	0.059	0.057	0.058	0.059	0.059		0.058

Graph 1. Long-term North Dakota Ozone Design Values with Linear Trends.³⁵

³⁴ Data source: EPA Air Quality System (AQS).

³⁵ *Id.* This graph, printed here in grayscale, is *also available* in color at Design Value History for ND – EPA in the docket.



III. Final Action

The EPA is approving multiple elements and disapproving a single element of the following infrastructure SIP submissions with respect to infrastructure requirements for the 2015 ozone NAAQS for Colorado and North Dakota.

With respect to Colorado, the EPA is approving Colorado's September 17, 2018 infrastructure SIP submission as meeting all of the CAA section 110(a)(2) infrastructure elements for the 2015 ozone NAAQS.

With respect to North Dakota, the EPA is approving North Dakota's November 6, 2018 SIP submission³⁶ for the following CAA section 110(a)(2) infrastructure elements for the 2015 ozone NAAQS: (A), (B), (C), (D)(i)(I) Prong 1 Interstate transport - significant contribution, (D)(i)(I) Prong 2 Interstate transport - interference with maintenance, (D)(i)(II) Prong 3 Interstate transport - prevention of significant deterioration, (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).

For the reasons stated in the NPRM, the EPA is partially disapproving North Dakota's SIP submittal as to 110(a)(2)(D)(i)(II) prong 4 Interstate transport - visibility. 84 FR 36527. As noted in the NPRM, the EPA is not required to take further action with regard to the prong 4 disapproval. The EPA has an obligation to disapprove prong 4 requirements as a result of disapproving portions of a state's regional haze SIP submission. However, as discussed in the NPRM, FIP requirements promulgated by the EPA are already in effect that correct all regional haze SIP deficiencies for the first planning period for North Dakota. All of North Dakota's obligations under 40 CFR 51.308 and 51.309, including those relevant to participation in a regional haze planning process and achieving the State's apportionment of emission reduction

³⁶ The EPA notes that in few instances our July 29, 2019 NPRM (84 FR 36516) erroneously referenced certain North Dakota rules and regulations that had been renumbered due to the transfer of authority from the North Dakota Department of Health (NDDH) to the North Dakota Department of Environmental Quality (NDEQ) (for more information, please see footnote 1 in our July 29, 2019 NPRM). The NDDH rules and regulations were EPA-approved, however with the transfer of authority to the NDEQ, those rules and regulations were repealed and have been recodified and EPA-approved (see 84 FR 1610, February 5, 2019). The difference between the rule and regulation changes from NDDH to NDEQ is resolved by adding a "decimal point one" (.1); *e.g.* under the NDDH, North Dakota Administrative Code (NDAC) 33-15 changed to NDAC 33.1-15 under the NDEQ. We further note that the State's submittal correctly references the EPA-approved NDEQ rules and regulations. Although our July 29, 2019 NPRM contains these errors in some instances, our analysis for the July 29, 2019 NPRM evaluated the approvability of the North Dakota infrastructure SIP submission based on the correct NDEQ statutes.

obligations as to Class I areas in other states, are being addressed either through FIPs or SIPs for the first planning period. This ensures that emissions from sources within North Dakota are not interfering with measures required to be included in other air agencies' plans to protect visibility. Under the EPA's 2013 iSIP guidance, this is sufficient to satisfy prong 4 requirements for the first planning period. *See* 2013 Guidance at 33. Thus, there are no additional practical consequences from this disapproval for the State, the sources within its jurisdiction, or the EPA. *See id.* at 34-35. The EPA finds its prong 4 obligations for North Dakota for the 2015 ozone NAAQS are satisfied.

Finally, we are approving a portion of North Dakota's May 2, 2019 submission of Chapter 33.1-15-15, the air pollution control rules of the State of North Dakota, which updates the date of IBR of Federal rules. The EPA is solely approving the revision applicable to the IBR date for 40 CFR 52.21(l)(1).

IV. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of North Dakota Administrative Code Chapter 33.1-15-15 described in Section III of this preamble. The EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 8 Office (please contact the persons identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the State implementation plan, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the

effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.³⁷

V. Statutory and Executive Order Reviews

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, 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);

³⁷ See 62 FR 27968, May 22, 1997.

- 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 the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

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

days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action 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, Greenhouse gases, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: March 25, 2020.

Gregory Sopkin,
Regional Administrator,
Region 8.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart G—Colorado

2. Section 52.353 is amended by adding paragraph (e) to read as follows:

§52.353 Section 110(a)(2) infrastructure requirements.

* * * * *

(e) The Colorado Department of Environmental Quality submitted certification of Colorado's infrastructure SIP for the 2015 O₃ NAAQS on September 17, 2018. Colorado's infrastructure certification demonstrates how the State, where applicable, has plans in place that meet the requirements of section 110 for the 2015 O₃ NAAQS. The State's Infrastructure SIP for 2015 O₃ NAAQS is approved with respect to CAA section 110(a)(1) and (2).

Subpart JJ—North Dakota

3. In §52.1820, the table in paragraph (c) is amended by revising the entry “33.1-15-15-01.2” to read as follows:

§52.1820 Identification of plan.

* * * * *

(c) * * *

Rule No.	Rule title	State effective date	EPA effective date	Final rule citation/date	Comments
		* * *	* * *	* * *	
	33.1-15-15. Prevention of Significant Deterioration of Air Quality				
		* * *	* * *	* * *	

33.1-15-15-01.2	Scope	1/1/2019	[insert date 30 days after date of publication in the Federal Register]	[insert Federal Register citation], [insert date of publication in the Federal Register]	Originally approved as 33-15-15-01 on 10/21/2016, 81 FR 72718.
* * * * *					

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4. Section 52.1833 is amended by adding paragraph (i) to read as follows:

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

* * * * *

(i) The North Dakota Department of Environmental Quality submitted certification of North Dakota's infrastructure SIP for the 2015 O₃ NAAQS on November 6, 2018. North Dakota's infrastructure certification demonstrates how the State, where applicable, has plans in place that meet the requirements of section 110 for (A), (B), (C), (D)(i)(I) (Prongs 1 and 2), (D)(i)(II) (Prong 3), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). The EPA is disapproving (D)(i)(II) (Prong 4).

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