

distributing royalties for this period. If not, what would be a better alternative?

4. Is the disaggregation by type of service proposed in § 370.4(f) (i.e., nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service, or business establishment service) sufficient to determine a reasonable proxy for generating corresponding reports of use for similar types of non-reporting services?

Is further disaggregation of some service types, as currently referenced in 37 CFR Part 380 (e.g., disaggregation of nonsubscription transmission services into commercial webcasters, noncommercial webcasters, broadcasters, or noncommercial educational webcasters) desirable to determine a better proxy for generating corresponding reports of use for such non-reporting services? Would this type of further disaggregation be practicable? Would the benefits yielded by such further disaggregation, if any, justify the incremental costs of doing so?

5. Does the proposed regulatory language in §§ 370.3(i) and 370.4(f) (i.e., “\* \* \* service has not provided a report of use required under this section \* \* \*”) clearly encompass both the failure of a service to provide reports of use as well as instances where the service files an unusable report of use?

SoundExchange’s petition is posted on the Copyright Royalty Board Web site at <http://www.loc.gov/crb/3-24-11-SoundExchange-petition-proxy.pdf>.

#### List of Subjects

37 CFR Part 370

Copyright, Sound recordings.

37 CFR Part 382

Copyright, Digital audio transmissions, Performance right, Sound recordings.

#### Proposed Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges propose amending 37 CFR parts 370 and 382 as follows:

#### PART 370—NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY LICENSES

1. The authority citation for part 370 continues to read as follows:

**Authority:** 17 U.S.C. 112(e)(4), 114(f)(4)(A).

2. Section 370.3 is amended by adding new paragraph (i) to read as follows:

#### § 370.3 Reports of use of sound recordings under statutory license for preexisting subscription services.

(i) In any case in which a preexisting subscription service has not provided a report of use required under this section for use of sound recordings under section 112(e) or section 114 of title 17 of the United States Code, or both, prior

to January 1, 2010, reports of use for the corresponding calendar year filed by other preexisting subscription services shall serve as the reports of use for the non-reporting service, solely for purposes of distribution of any corresponding royalties by the Collective.

3. Section 370.4 is amended by adding new paragraph (f) to read as follows:

#### § 370.4 Reports of use of sound recordings under statutory license for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services and business establishment services.

\* \* \* \* \*

(f) In any case in which a nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service, or business establishment service has not provided a report of use required under this section for use of sound recordings under section 112(e) or section 114 of title 17 of the United States Code, or both, prior to January 1, 2010, reports of use for the corresponding calendar year filed by other services of the same type shall serve as the reports of use for the non-reporting service, solely for purposes of distribution of any corresponding royalties by the Collective.

#### PART 382—RATES AND TERMS FOR DIGITAL TRANSMISSIONS OF SOUND RECORDINGS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY PREEXISTING SUBSCRIPTION SERVICES AND PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES

4. The authority citation of part 382 continues to read as follows:

**Authority:** 17 U.S.C. 112(e), 114, and 801(b)(1).

#### § 382.3 [Amended]

5. Section 382.3(c)(1) is amended by removing “§ 370.2” and adding “§ 370.3” in its place.

#### § 382.13 [Amended]

6. Section 382.13(f)(1) is amended by removing “§ 370.3” and adding “§ 370.4” in its place.

Dated: April 14, 2011.

**James Scott Sledge,**

*Chief U.S. Copyright Royalty Judge.*

[FR Doc. 2011–9455 Filed 4–18–11; 8:45 am]

**BILLING CODE 1410–72–P**

#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 52

[EPA–R08–OAR–2007–1037; FRL–9297–4]

#### Approval and Promulgation of State Implementation Plans; State of Colorado; Interstate Transport of Pollution Revisions for the 1997 PM<sub>2.5</sub> and 8-Hour Ozone NAAQS: “Significant Contribution,” “Interference with Maintenance,” and “Interference with Prevention of Significant Deterioration” Requirements

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve portions of a State Implementation Plan (SIP) revision submitted by the State of Colorado for the purpose of addressing the “good neighbor” provisions of Clean Air Act (“Act” or “CAA”) section 110(a)(2)(D)(i) for the 1997 8-hour ozone National Ambient Air Quality Standards (“NAAQS” or “standards”) and the 1997 fine particulate matter (“PM<sub>2.5</sub>”) NAAQS. This SIP revision addresses the requirement that the State of Colorado’s SIP (“Interstate Transport SIP”) have adequate provisions to prohibit air emissions from adversely affecting another state’s air quality through interstate transport. In this action, EPA is proposing to approve the Colorado Interstate Transport SIP provisions that address the requirement of section 110(a)(2)(D)(i) that emissions from Colorado sources do not significantly contribute to nonattainment of the 1997 PM<sub>2.5</sub> NAAQS in any other state, interfere with maintenance of the 1997 PM<sub>2.5</sub> NAAQS by any other state, or interfere with any other state’s required measures to prevent significant deterioration of air quality for the 1997 PM<sub>2.5</sub> and 8-hour ozone NAAQS. This action is being taken under section 110 of the CAA.

**DATES:** Comments must be received on or before May 19, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R08–OAR–2007–1037, by one of the following methods:

- <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- *E-mail:* [clark.adam@epa.gov](mailto:clark.adam@epa.gov).

- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).

- *Mail:* Deborah Lebow Aal, Acting Director, Air Program, Environmental

Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129.

• **Hand Delivery:** Deborah Lebow Aal, Acting Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop, Denver, Colorado 80202-1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA-R08-OAR-2007-1037. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

**Docket:** All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly-available docket materials are available either

electronically in <http://www.regulations.gov> or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop, Denver, Colorado 80202-1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Adam Clark, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P-AR, 1595 Wynkoop, Denver, Colorado 80202-1129, (303) 312-7104, [clark.adam@epa.gov](mailto:clark.adam@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Definitions**

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

- (i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.
- (ii) The words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.
- (iii) The initials *SIP* mean or refer to State Implementation Plan.
- (iv) The words *Colorado* and *State* mean the State of Colorado.

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##### **I. General Information**

*What should I consider as I prepare my comments for EPA?*

1. **Submitting CBI.** Do not submit CBI to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then

identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. **Tips for Preparing Your Comments.** When submitting comments, remember to:

- a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- b. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- d. Describe any assumptions and provide any technical information and/or data that you used.
- e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- f. Provide specific examples to illustrate your concerns, and suggest alternatives.
- g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- h. Make sure to submit your comments by the comment period deadline identified.

##### **II. What proposed action is EPA taking?**

EPA is proposing to approve a portion of Colorado's Interstate Transport SIP revision for the 1997 8-hour ozone and 1997 PM<sub>2.5</sub> NAAQS. This revision was submitted by the State on March 31, 2010.<sup>1</sup> Specifically, we are proposing to approve the portion of the plan that addresses the following requirements of CAA section 110(a)(2)(D)(i) which prohibit air pollutant emissions within the State that: (1) Significantly contribute to nonattainment of the 1997 PM<sub>2.5</sub> NAAQS in any other state; (2) interfere with maintenance of the 1997 PM<sub>2.5</sub> NAAQS by any other state; and (3) interfere with any other state's required measures to prevent significant deterioration of its air quality with

<sup>1</sup> The March 31, 2010 submission superseded earlier SIP submissions with respect to the section 110(a)(2)(D)(i) requirements that are the subject of this proposed action.

respect to the 1997 PM<sub>2.5</sub> and 8-hour ozone NAAQS.

### III. What is the background for this proposed action?

On July 18, 1997, EPA promulgated new NAAQS for ozone and for PM<sub>2.5</sub>. This action is being taken in response to the promulgation of both the 1997 ozone and PM<sub>2.5</sub> NAAQS. Section 110(a)(1) of the CAA requires states to submit SIPs to address a new or revised NAAQS within 3 years after promulgation of such standards, or within such shorter period as EPA may prescribe. Section 110(a)(2) lists the elements that such new SIPs must address, as applicable, including section 110(a)(2)(D)(i), which pertains to interstate transport of certain emissions. On August 15, 2006, EPA issued its “Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards” (“2006 Guidance”).<sup>2</sup> The 2006 Guidance recommends ways states may, in their submissions, meet the requirements of section 110(a)(2)(D)(i) for the 1997 8-hour ozone and PM<sub>2.5</sub> standards.

As identified in the 2006 Guidance, the “good neighbor” provisions in section 110(a)(2)(D)(i) require each state to submit a SIP that prohibits emissions that adversely affect another state in the ways contemplated in the statute. Section 110(a)(2)(D)(i) identifies four distinct requirements related to the impacts of interstate transport. The SIP must prevent sources in the state from emitting pollutants in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in any other state; (2) interfere with maintenance of the NAAQS by any other state; (3) interfere with required measures to prevent significant deterioration of air quality in any other state; or (4) interfere with efforts to protect visibility in any other state. In this rulemaking EPA is addressing the first three requirements of section 110(a)(2)(D)(i).

On June 11, 2008, the State of Colorado submitted to EPA an Interstate Transport SIP addressing all four requirements of CAA section 110(a)(2)(D)(i) for the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS. In response to EPA’s concerns regarding the June 11, 2008 submission, the State later submitted

two superseding interstate transport SIP revisions: (a) A June 18, 2009 submission addressing requirements (1) and (2) of section 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS; and (b) a March 31, 2010 submission addressing requirements (3) and (4) for the 1997 8-hour ozone NAAQS and requirements (1) through (4) for the 1997 PM<sub>2.5</sub> NAAQS. EPA has previously approved the “significant contribution to nonattainment” and the “interfere with maintenance” requirements for the State of Colorado for the 1997 8-hour ozone NAAQS in final rule actions published June 3 and November 22, 2010 (75 FR 31306; 75 FR 71029). EPA proposed approval of the “interfere with visibility” requirement for the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS on February 14, 2011 (76 FR 8326). In this rulemaking EPA is evaluating only the portions of Colorado’s March 31, 2010 submission that address requirements (1), (2), and (3) for the 1997 PM<sub>2.5</sub> NAAQS, and requirement (3) for the 1997 8-hour ozone NAAQS. In its submission, the State indicated that its current SIP already contains provisions adequate to prevent such contribution and interference. EPA is proposing to find that, as stated by Colorado in the March 31, 2010 submission, the Colorado Interstate Transport SIP has adequate provisions addressing requirements (1), (2), and (3) of section 110(a)(2)(D)(i) for the 1997 PM<sub>2.5</sub> NAAQS and requirement (3) for the 1997 8-hour ozone NAAQS.

### IV. What is the state process to submit these materials to EPA?

Section 110(k) of the CAA addresses EPA’s rulemaking action on SIP submissions by states. The CAA requires states to observe certain procedural requirements in developing SIP revisions for submission to EPA. Sections 110(a)(1) and (2) of the CAA require that each SIP revision be adopted after reasonable notice and public hearing. This must occur prior to the revision being submitted by a state to EPA.

The Colorado Air Quality Control Commission (AQCC) held a public hearing in December 2009 for the Interstate Transport SIP revision: “State of Colorado Implementation Plan To Meet the Requirements of the Clean Air Act Section 110(a)(2)(D)(i)(I) and (II)—Regarding Interstate Transport for the 1997 8-Hour Ozone and PM<sub>2.5</sub> NAAQS.” The AQCC adopted this revision on January 13, 2010, and the State submitted it to EPA on March 31, 2010. As discussed above, the March 31, 2010 submission addresses the elements of

110(a)(2)(D)(i) that are the subject of this proposed action.

EPA has reviewed the March 31, 2010, submission from the State of Colorado and has determined that the State met the requirements for reasonable notice and public hearing under section 110(a)(1) and (2) of the CAA.

### V. EPA’s Review and Technical Information

EPA is evaluating the State’s submission in light of the statutory requirements of section 110(a)(2)(D)(i). In particular, section 110(a)(2)(D)(i)(I) requires that a SIP contain provisions adequate to prevent emissions from sources in that state from contributing significantly to nonattainment of the relevant NAAQS, or interfering with maintenance of the relevant NAAQS, in any other state. Section 110(a)(2)(D)(i)(II) contains a similar requirement that a SIP contain provisions adequate to prevent emissions from sources in the state from interfering with measures required to prevent significant deterioration of air quality in any other state.

To assist states with SIP submissions for the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS, EPA issued the 2006 Guidance to make recommendations with respect to all four requirements of section 110(a)(2)(D)(i). More recently, EPA has proposed a rule (“Transport Rule Proposal”) addressing the “significant contribution to nonattainment” and “interfere with maintenance” requirements of 110(a)(2)(D)(i) for many states located in the eastern United States.<sup>3</sup> Although Colorado is not among the states that EPA is considering for inclusion within the geographic region that may be covered by the final rule that will be based upon the Transport Rule Proposal, EPA is using a comparable approach to evaluate the emissions from sources in Colorado, as well as considering certain data developed to support the Transport Rule Proposal as discussed in more detail below, as part of evaluating the issue of interstate transport from Colorado for the first two requirements. For the third requirement, EPA is evaluating the SIP submission from the state in light of the recommendations contained in the Agency’s prior 2006 guidance document and in light of other subsequent actions as discussed below.

<sup>2</sup>Memorandum from William T. Harnett entitled, “Guidance for State Implementation Plan (SIP) Submissions To Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards” (Aug. 15, 2006).

<sup>3</sup>“Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone,” 75 FR 45210 (Aug. 2, 2010).

### A. Background on Section

#### 110(a)(2)(D)(i)(I)

The first two elements of section 110(a)(2)(D)(i) require states to have SIPs with adequate provisions to prevent any source or other type of emissions activity within the state from emitting air pollutants in amounts that will “contribute significantly” to nonattainment in other states or will “interfere with maintenance” of the NAAQS by any other state. The terms “contribute significantly” and “interfere with maintenance” are not defined in the statute. Therefore, EPA has interpreted these terms in past regulatory actions addressing interstate transport, such as the 1998 NO<sub>x</sub> SIP Call, in which EPA took action to eliminate emissions of NO<sub>x</sub> that significantly contributed to nonattainment, or interfered with maintenance of, the then applicable ozone NAAQS through interstate transport of NO<sub>x</sub> and the resulting ozone.<sup>4</sup> The NO<sub>x</sub> SIP Call was the mechanism through which EPA evaluated whether or not the NO<sub>x</sub> emissions from sources in certain states had such prohibited interstate impacts, and if they had such impacts, required the states to adopt substantive SIP revisions to eliminate the NO<sub>x</sub> emissions, whether through participation in a regional cap and trade program or by other means.

After promulgation of the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS, EPA again recognized that regional transport was a serious concern throughout the eastern U.S. and therefore developed the 2005 Clean Air Interstate Rule (CAIR) to address emissions of SO<sub>2</sub> and NO<sub>x</sub> that exacerbate ambient ozone and PM<sub>2.5</sub> levels in many downwind areas through interstate transport.<sup>5</sup> Within CAIR, EPA likewise interpreted the terms “contribute significantly” and “interfere with maintenance” as part of the evaluation of whether or not the emissions of sources in certain states had such impacts on areas that EPA determined would either be in violation of the NAAQS, or would be in jeopardy of violating the NAAQS, in a modeled future year unless actions were taken by upwind states to reduce SO<sub>2</sub> and NO<sub>x</sub> emissions. Through CAIR, EPA again required states that had such interstate impacts to adopt substantive SIP

revisions to eliminate the SO<sub>2</sub> and NO<sub>x</sub> emissions, whether through participation in a regional cap and trade program or by other means.

EPA’s 2006 Guidance addressed section 110(a)(2)(D)(i) requirements for the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS. For those states subject to CAIR, EPA indicated that compliance with CAIR would meet the two requirements of section 110(a)(2)(D)(i)(I) for these NAAQS. For states not within the CAIR region, EPA recommended that states evaluate whether or not emissions from their sources would “contribute significantly” or “interfere with maintenance” in other states, following the conceptual approach adopted by EPA in CAIR. After recommending various types of information that could be relevant for the technical analysis to support the SIP submission, such as the amount of emissions and meteorological conditions in the state, EPA further indicated that it would be appropriate for the state to assess impacts of its emissions on other states using considerations comparable to those used by EPA “in evaluating significant contribution to nonattainment in the CAIR.”<sup>6</sup> EPA did not make specific recommendations for how states should assess “interfere with maintenance” separately, and discussed the first two elements of section 110(a)(2)(D) together without explicitly differentiating between them.

In 2008, however, the U.S. Court of Appeals for the D.C. Circuit found that CAIR and the related CAIR federal implementation plans were unlawful.<sup>7</sup> Among other issues, the court held that EPA had not correctly addressed the second element of section 110(a)(2)(D)(i)(I) in CAIR. The court noted that “EPA gave no independent significance to the ‘interfere with maintenance’ prong of section 110(a)(2)(D)(i)(I) to separately identify upwind sources interfering with downwind maintenance.”<sup>8</sup> EPA’s approach, the court reasoned, would leave areas that are “barely meeting attainment” with “no recourse” to address upwind emissions sources.<sup>9</sup> The court therefore concluded that a plain language reading of the statute requires EPA to give independent meaning to the interfere with maintenance requirement of section

110(a)(2)(D) and that the approach used by EPA in CAIR failed to do so.

In addition to affecting CAIR directly, the court’s decision in the North Carolina case indirectly affects EPA’s recommendations to states in the 2006 Guidance with respect to the interfere with maintenance element of section 110(a)(2)(D)(i)(I) because the agency’s guidance suggested that states use an approach comparable to that used by EPA in CAIR. States such as Colorado developed and adopted their Interstate Transport SIPs not long after the Court’s July 2008 decision, but well before EPA, in the Transport Rule Proposal (*see* below), was able to propose a new approach for the interference with maintenance element. Without recommendations from EPA, Colorado’s SIP may not have sufficiently differentiated between the significant contribution to nonattainment and interference with maintenance elements of the statute, and relied in a general way on the difference between monitored concentrations and the 1997 PM<sub>2.5</sub> NAAQS to evaluate the impacts of State emissions on maintenance of the NAAQS in other states. It is necessary to evaluate these state submissions for section 110(a)(2)(D)(i)(I) in such a way as to assure that the interfere with maintenance element of the statute is given independent meaning and is appropriately evaluated using the types of information that EPA recommended in the 2006 Guidance. To accomplish this, it is necessary to use an updated approach to this issue and to supplement the technical analysis provided by the State in order to evaluate the submissions with respect to both the significant contribution and the interfere with maintenance elements of section 110(a)(2)(D)(i)(I).

EPA has recently proposed a new rule, the “Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone” (“Transport Rule Proposal”), in order to address interstate transport under section 110(a)(2)(D)(i)(I) and the judicial remand of CAIR.<sup>10</sup> As part of the Transport Rule Proposal, EPA specifically reexamined the section 110(a)(2)(D)(i)(I) requirement that emissions from sources in a state must not “interfere with maintenance” of the 1997 8-hour ozone NAAQS and 1997 PM<sub>2.5</sub> NAAQS by other states. In the proposal, EPA developed an approach to identify areas that it predicts to be close to the level of the 1997 8-hour ozone NAAQS and 1997 PM<sub>2.5</sub> NAAQS in the future, and therefore at risk to become or continue to be nonattainment

<sup>4</sup> See, 63 FR 57356 (Oct. 27, 1998). EPA’s general approach to section 110(a)(2)(D) was upheld in *Michigan v. EPA*, 213 F.3d 663 (DC Cir. 2000), cert. denied, 532 U.S. 904 (2001). However, EPA’s approach to interference with maintenance in the NO<sub>x</sub> SIP Call was not explicitly reviewed by the court. See, *North Carolina v. EPA*, 531 F.3d 896, 907–09 (DC Cir. 2008).

<sup>5</sup> See, 70 FR 25162 (May 12, 2005).

<sup>6</sup> 2006 Guidance at 5.

<sup>7</sup> See, *North Carolina v. EPA*, 531 F.3d 896 (DC Cir. 2008).

<sup>8</sup> *Id.* at 909.

<sup>9</sup> *Id.*

<sup>10</sup> 75 FR 45210 (Aug. 2, 2010).

for these NAAQS unless emissions from sources in other states are appropriately controlled. This approach starts by identifying those specific geographic areas for which further evaluation is appropriate and differentiating between areas where the concern is with interference with maintenance with those where the concern is with significant contribution to nonattainment.

As described in more detail below, EPA's Transport Rule analysis evaluates data from existing monitors over three overlapping three-year periods (i.e., 2003–2005, 2004–2006, and 2005–2007), as well as air quality modeling data, in order to determine which areas are predicted to be violating the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS in 2012, and which areas are predicted potentially to have difficulty with maintaining attainment as of that date. In essence, if an area's projected data for 2012 indicates that it would be violating the NAAQS based on the average of these three overlapping periods, then this monitor location is appropriate for comparison for purposes of the significant contribution to nonattainment element of section 110(a)(2)(D)(i). If, however, an area's projected data indicate that it would be violating the NAAQS based on the highest single three year period, but not over the average of the three periods, then this monitor location is appropriate for comparison for purposes of the interfere with maintenance element of the statute.

For the PM<sub>2.5</sub> NAAQS, EPA evaluated concentrations of both the annual PM<sub>2.5</sub> NAAQS and the 24-hour PM<sub>2.5</sub> NAAQS. The 1997 annual PM<sub>2.5</sub> NAAQS is met when the 3-year average of the annual mean concentration is 15.0 micrograms per cubic meter (µg/m<sup>3</sup>) or less. The 3-year average annual mean concentration is computed at each site by averaging the daily Federal Reference Method (FRM) samples by quarter, averaging these quarterly averages to obtain an annual average, and then averaging the three annual averages to get the design value. The 1997 24-hour PM<sub>2.5</sub> NAAQS is met when the 3-year average of the annual 98th percentiles is 65 µg/m<sup>3</sup> or less.<sup>11</sup> The 3-year average mean 98th percentile concentration is computed at each site by averaging the 3 individual annual 98th percentile values at each site. The 3-year average 98th percentile

concentration is referred to as the 24-hour average design value.

To project future annual PM<sub>2.5</sub> design values, EPA relied on monitoring data from the AQS combined with photochemical air quality modeling results. The Transport Rule Proposal generates the projected future PM<sub>2.5</sub> values based on an average of three design value periods which include the years 2003–2007 (i.e., design values for 2003–2005, 2004–2006, and 2005–2007). The average of the three design values creates a 5-year “weighted average” value. The 5-year weighted average values were then projected to the future years that were analyzed for the Transport Rule Proposal.<sup>12</sup> EPA used the 5-year weighted average concentrations to project concentrations anticipated in 2012 to determine which monitoring sites are expected to be nonattainment in this future year. EPA also projected 2012 design values based on each of the three base design value year periods (i.e., 2003–2005, 2004–2006, and 2005–2007). The highest future projection is referred to as the “maximum design value” and gives an indication of potential variability in future projections due to differences in actual meteorology and emissions from what was modeled.

EPA then used these weighted averages and maximum design values to identify nonattainment and maintenance receptors. For the 1997 annual PM<sub>2.5</sub> NAAQS, EPA defined nonattainment receptors as those sites with an annual PM<sub>2.5</sub> 5-year weighted average concentration (average design value) above 15.05 µg/m<sup>3</sup> in 2012. EPA then defined as maintenance receptors those sites that are projected to be attainment based on the 5-year weighted average design value, but that have a maximum design value (based on a projected single three year period) above 15.05 µg/m<sup>3</sup> in 2012. These maintenance sites are attaining the NAAQS based on the projected average design values, but EPA anticipates that there will be more difficulty in maintaining attainment of the NAAQS at these locations if there are adverse variations in meteorology or emissions.

By this method, EPA has identified those areas—the nonattainment receptors—that are appropriate for evaluating whether emissions from sources in another state could significantly contribute to nonattainment. Likewise, EPA has identified those areas—the maintenance

receptors—that are appropriate for evaluating whether the emissions from sources in another state could interfere with maintenance. EPA then uses a “weight-of-evidence” analysis, separate from that used in the Transport Rule Proposal, to examine the potential impacts of emissions from upwind states on these nonattainment and maintenance receptors in downwind states. This proposed approach for identifying those areas that are predicted to have nonattainment or maintenance problems is appropriate to evaluate the section 110(a)(2)(D)(i) SIP submission of a state for the significant contribution and interfere with maintenance elements. EPA's 2006 Guidance did not provide this specific recommendation to states, but in light of the court's decision on CAIR, EPA will itself follow this approach in acting upon the Colorado submission.

As explained in the 2006 Guidance, section 110(a)(2)(D)(i) SIP submissions from all states do not necessarily need to follow precisely the same analytical approach as CAIR. In the 2006 Guidance, EPA stated that: “EPA believes that the contents of the SIP submission required by section 110(a)(2)(D)(i) may vary depending upon the facts and circumstances related to the specific NAAQS. In particular, the data and analytical tools available at the time the State develops and submits a SIP for a new or revised NAAQS necessarily affects the contents of the required submission.”<sup>13</sup> EPA also indicated in the 2006 Guidance that it did not anticipate that sources in states outside the geographic area covered by CAIR were significantly contributing to nonattainment, or interfering with maintenance, in other states.<sup>14</sup> As noted in the Transport Rule Proposal, the more widespread and serious transport problems in the eastern United States are analytically distinct. For the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS, nonattainment and maintenance problems in the western United States are relatively local in nature with only limited impacts from interstate transport.<sup>15</sup> In the Transport Rule Proposal, EPA did not calculate interstate ozone or PM<sub>2.5</sub> contributions to or from western states, including Colorado.

Accordingly, section 110(a)(2)(D)(i) SIP submissions for states not evaluated in the Transport Rule Proposal may be evaluated using a weight-of-evidence approach that takes into account available relevant information, such as

<sup>11</sup> The 2006 24-hour PM<sub>2.5</sub> NAAQS, which is not the subject of this action, is met when the 3-year average of the annual 98th percentile PM<sub>2.5</sub> concentrations is 35 µg/m<sup>3</sup> or less.

<sup>12</sup> Transport Rule Proposal, 75 FR at 45246–51. Additional information concerning these weighted averages is provided in the Western States Design Values Memo.

<sup>13</sup> 2006 Guidance at 3.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> Transport Rule Proposal, 75 FR at 45227.

that recommended by EPA in the 2006 Guidance for states outside the area affected by CAIR. Such information may include, but is not limited to, the amount of emissions in the state relevant to the NAAQS in question, the meteorological conditions in the area, the distance from the state to the nearest monitors in other states that are appropriate receptors, or such other information as may be probative to consider whether sources in the state may significantly contribute to nonattainment or interfere with maintenance of the 1997 PM<sub>2.5</sub> NAAQS in other states. These submissions can rely on modeling when acceptable modeling technical analyses are available, but modeling is not necessarily required if other available information is sufficient to evaluate the presence or degree of interstate transport in a given situation.

#### *B. EPA's Evaluation of Colorado's Significant Contribution to Nonattainment*

To meet the requirements of section 110(a)(2)(D)(i), the State of Colorado on March 31, 2010 made a submission to EPA addressing all four 110(a)(2)(D)(i) requirements for the 1997 PM<sub>2.5</sub> NAAQS, and requirements (3) and (4) for the 1997 8-hour ozone NAAQS. The State used many of the methods recommended in the 2006 Guidance. This included consideration of information such as the geographic location of violating areas and meteorological data. The State's submission also considered AQS monitoring data from Colorado and surrounding states. The State's submission concluded that its own analysis "supports the assertion that Colorado does not contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to the 1997 PM<sub>2.5</sub> NAAQS."<sup>16</sup> In its submission, the State of Colorado further indicated that its current SIP is adequate to prevent such contribution and interference, and therefore no additional reductions would be necessary to prevent such contribution or interference.

Colorado submitted its Interstate Transport SIP before the Transport Rule Proposal was completed and available. Therefore, the State could not have anticipated which nonattainment receptors EPA would consider most appropriate for the analysis of the

impact of transport from Colorado's sources on PM<sub>2.5</sub> levels in other states. In this proposal, EPA therefore conducts additional analysis, using a weight-of-evidence approach separate from that used in the Transport Rule Proposal, to determine if emissions from Colorado sources significantly contribute to nonattainment of the 1997 PM<sub>2.5</sub> NAAQS in any other state. This analysis considers: (a) Portions of EPA modeling and analysis conducted for the 2005 CAIR and the 2010 Transport Rule Proposal;<sup>17</sup> (b) projections of western nonattainment and maintenance receptors based on Transport Rule modeling;<sup>18</sup> and (c) geographical, topographical and meteorological factors relevant to the potential for pollution transport. None of these factors is by itself determinative of whether emissions from Colorado significantly contribute to nonattainment of the 1997 PM<sub>2.5</sub> NAAQS in any other state. However, when considered together through the weight-of-evidence approach, the factors provide the basis for a reliable qualitative assessment of significant contribution.

As described in detail above, in the Transport Rule Proposal, EPA projected future concentrations of PM<sub>2.5</sub> to identify receptors that are expected to be violating the 1997 PM<sub>2.5</sub> NAAQS in 2012. For the 1997 annual PM<sub>2.5</sub> NAAQS, the receptors EPA identified in the Transport Rule Proposal nearest to Colorado are located in Chicago, IL to the northeast, East St. Louis, IL to the east, and Birmingham, AL to the southeast.<sup>19</sup> No monitoring sites within the geographic region addressed in the Transport Rule Proposal analysis were projected to be violating the 1997 24-hour PM<sub>2.5</sub> NAAQS.<sup>20</sup>

Available information indicates that emissions from Colorado are unlikely to contribute significantly to violations of the 1997 annual PM<sub>2.5</sub> NAAQS in Chicago, IL, in East St. Louis, IL, or in Birmingham, AL. In our rulemaking

<sup>17</sup> Specifically, from CAIR, EPA considers only CAIR Proposal PM<sub>2.5</sub> zero-out modeling analysis. From the Transport Rule Proposal, EPA considers: (a) Projected annual PM<sub>2.5</sub> nonattainment receptor locations; (b) projected statewide SO<sub>2</sub> and NO<sub>x</sub> emission data for Colorado and three states east of Colorado (Kansas, Nebraska, and Oklahoma); and (c) projected downwind contributions to annual PM<sub>2.5</sub> nonattainment receptors for Kansas, Nebraska, and Oklahoma.

<sup>18</sup> Memorandum from Brian Timin, EPA Office of Air Quality Planning and Standards, "Documentation of Future Year Ozone and Annual PM<sub>2.5</sub> Design Values for Western States," (Aug. 23, 2010) ("Western States Design Values Memo"), available in the docket for this action.

<sup>19</sup> Transport Rule Proposal, 75 FR at 45247–48 (Table IV.C–7).

<sup>20</sup> *Id.* at 45249–51 (Table IV.C–9).

process for CAIR, EPA modeled the contribution from individual states to counties in the eastern U.S. projected to be nonattainment for the 1997 annual PM<sub>2.5</sub> NAAQS in 2010. According to this modeling, EPA projected annual PM<sub>2.5</sub> contributions from Colorado sources to Cook County (Chicago), IL in 2010 to be 0.03 µg/m<sup>3</sup>,<sup>21</sup> which is well below the significance threshold of one percent of the NAAQS (0.15 µg/m<sup>3</sup> for the 1997 annual PM<sub>2.5</sub> NAAQS) used in the Transport Rule Proposal. Contributions from Colorado to annual PM<sub>2.5</sub> emissions in Saint Clair County (East St. Louis), IL in 2010 were modeled to be 0.04 µg/m<sup>3</sup>. Finally, projected contributions from Colorado to annual PM<sub>2.5</sub> emissions in Jefferson County (Birmingham), AL were modeled to be 0.03 µg/m<sup>3</sup>, also far below the significance threshold. The CAIR Proposal modeling used a 2010 future year assessment versus the 2012 year used in the Transport Rule Proposal, so it is not determinative of significant contribution from Colorado to these receptors, but it does provide an initial piece of evidence for EPA's weight-of-evidence analysis.

Certain portions of the Transport Rule Proposal modeling analysis provide more evidence that emissions of PM<sub>2.5</sub> or its precursors from Colorado sources are not likely to contribute significantly to the nonattainment receptors (identified above) in Illinois and Alabama, or to any nonattainment receptors located in states further east.<sup>22</sup> EPA did not model the impacts of emissions from Colorado sources on receptors in other states as part of the Transport Rule Proposal. However, Kansas, Nebraska and Oklahoma were among the states whose interstate contribution to annual PM<sub>2.5</sub> nonattainment receptors in other states EPA did model for the Transport Rule Proposal.<sup>23</sup> None of these three states (Kansas, Oklahoma and Nebraska) was projected to contribute more than 0.09 µg/m<sup>3</sup> (60% of the significance threshold) to any annual PM<sub>2.5</sub> nonattainment receptor inside the

<sup>21</sup> "Technical Support Document for the Interstate Air Quality Rule Air Quality Modeling Analyses Appendix H, PM<sub>2.5</sub> Contributions to Downwind Nonattainment Counties in 2010" (Jan. 30, 2004), available in the docket for this action.

<sup>22</sup> Transport Rule Proposal, 75 FR at 45247–48 (Table IV.C–7).

<sup>23</sup> As technical support for the Transport Rule Proposal, all 48 contiguous states were modeled using a horizontal grid resolution of 36 x 36 km. States in the eastern U.S. modeled for contribution in the Transport Rule Proposal, including Kansas, Nebraska and Oklahoma, were also modeled using a finer horizontal grid resolution of 12 x 12 km. Contribution was determined using zero-out modeling.

<sup>16</sup> See "State of Colorado Implementation Plan to Meet the Requirements of the Clean Air Act Section 110(a)(2)(d)(i)(I) and (II)—Regarding Interstate Transport for the 1997 8-Hour Ozone and PM<sub>2.5</sub> NAAQS" at 46, available in the docket for this action.

Transport Rule Proposal domain in 2012.<sup>24</sup>

For the Transport Rule Proposal, EPA projected total emissions for NO<sub>x</sub> and SO<sub>2</sub>, the two major precursors for PM<sub>2.5</sub>, for each of the 48 contiguous states in 2012 and 2014. Colorado's NO<sub>x</sub> and SO<sub>2</sub> emissions were generally less than or similar to those in Kansas, Oklahoma and Nebraska.<sup>25</sup> Under prevailing meteorological conditions, all three states are typically downwind from Colorado and upwind of the nonattainment receptors in the eastern U.S. Furthermore, emissions from Colorado must travel a greater distance (compared to these three states) to reach nonattainment receptors in the eastern U.S.<sup>26</sup> Though distance by itself is not an obstacle to long range transport of PM<sub>2.5</sub> and/or its precursors, and therefore by itself not determinative of significant contribution, greater distance provides greater opportunities for PM<sub>2.5</sub> and precursor dispersion and/or removal from the atmosphere due to the effect of winds or chemical sink processes. In summary, EPA-projected PM<sub>2.5</sub> precursor emissions from Colorado are lower or similar to those in Kansas, Nebraska or Oklahoma, and, based on geography and meteorology, emissions from these three states are more likely to reach nonattainment receptors in the eastern U.S. than are emissions from Colorado. Therefore, because Kansas, Nebraska and Oklahoma are each well below the significance threshold for contribution for the annual PM<sub>2.5</sub> NAAQS in the Transport Rule Proposal, Colorado is likely to be even further below the significance threshold. This consideration, along with the 2004 CAIR Proposal modeling, when taken into account under the weight-of-evidence approach, shows that Colorado emissions are very unlikely to contribute significantly to violations of the 1997 annual PM<sub>2.5</sub> standard at

<sup>24</sup> Transport Rule Proposal, 75 FR at 45255 (Table IV.C-13).

<sup>25</sup> See "Technical Support Document (TSD) for the Transport Rule Docket ID No. EPA-HQ-OAR-2009-0491. Emission Inventories" at 40-43 (June 2010). Based on these projections, in 2012, Kansas will have higher NO<sub>x</sub> (~24%) and SO<sub>2</sub> (~35%) emissions than Colorado, Oklahoma will have higher NO<sub>x</sub> (~54%) and SO<sub>2</sub> (~147%) emissions than Colorado, and Nebraska will have lower NO<sub>x</sub> (~23%) and higher SO<sub>2</sub> (~94%) emissions than Colorado.

<sup>26</sup> At the shortest possible distance for each measurement, the eastern Colorado border is approximately 320 miles west of the eastern Nebraska border, 370 miles west of the eastern Kansas border, and 410 miles west of the eastern Oklahoma border. It should be noted that the measured distance represents that of the straight (and shortest) path, which does not reflect the more circuitous paths typically followed by air parcels.

nonattainment receptors in Illinois, Alabama or any states further east.

To assist in the evaluation of whether emissions from a state's sources contribute significantly to nonattainment of the NAAQS in western states, EPA has also developed an analysis identifying monitors projected to be in nonattainment or at risk for maintenance of the NAAQS within a modeling domain that includes the western states. The analysis presented in the memo, "Documentation of Future Year Ozone and Annual PM<sub>2.5</sub> Design Values for Western States,"<sup>27</sup> ("Western State Design Values Memo") uses model results from the Transport Rule Proposal based on a continental U.S. 36 km grid, which is coarser than the final 12 km grid used in the Transport Rule for the eastern states. Though the 36 km grid is more coarse, EPA considers these modeling results sufficient to determine the appropriate nonattainment and maintenance receptors for analysis of interstate transport from Colorado to other western states. In identifying these receptors, the Western States Design Values Memo takes the same approach as the Transport Rule Proposal (5 year weighted average design values to project 2012 concentrations).<sup>28</sup> For the 1997 annual PM<sub>2.5</sub> NAAQS, the nonattainment receptors identified in the Memo are all located in southern and central California, and the nonattainment receptor nearest to Colorado is located in San Bernardino, CA.

In the Western States Design Values Memo, EPA did not calculate interstate PM<sub>2.5</sub> contributions to or from western states. Therefore, EPA is using a weight-of-evidence approach to determine if the emissions from Colorado sources contribute significantly to nonattainment for receptors in San Bernardino, CA, or other nonattainment receptors in California further west. Distance and topography, although not determinative by themselves, indicate that PM<sub>2.5</sub> transport from Colorado to California is unlikely. The southwestern corner of Colorado is approximately 500 miles from San Bernardino, making distance an obstacle for PM<sub>2.5</sub> emissions transport. Moreover, the mountainous topography between Colorado's sources and California's nearest nonattainment receptors presents a large obstacle to PM<sub>2.5</sub> transport. The prevailing wind orientation also provides evidence that Colorado's emissions are unlikely to contribute significantly to nonattainment of the 1997 annual PM<sub>2.5</sub>

<sup>27</sup> Supra n. 18.

<sup>28</sup> *Id.* at 5.

NAAQS in California. West of the Continental Divide the prevailing winds generally move from south-westerly, westerly, or north-westerly directions, as indicated by the typical movement of weather systems.

Finally, projected design values presented in the Western States Design Values Memo provide some evidence that significant contribution from Colorado sources to annual PM<sub>2.5</sub> nonattainment receptors in California is unlikely. The highest projected average PM<sub>2.5</sub> design value for 2012 in Colorado is 9.36 µg/m<sup>3</sup>, or 64% of the 1997 annual PM<sub>2.5</sub> NAAQS.<sup>29</sup> The highest projected average PM<sub>2.5</sub> design value for 2012 throughout Utah, Arizona and Nevada, the states between Colorado and California, is 12.7 µg/m<sup>3</sup>, or 84.6% of the NAAQS.<sup>30</sup> Given the distance between Colorado sources and California nonattainment receptors, the intervening mountainous topography, the general west-to-east direction of transport winds in the western U.S., and the low projected PM<sub>2.5</sub> design values in Colorado and intervening states, the weight-of-evidence makes it reasonable to conclude that Colorado sources are very unlikely to contribute significantly to nonattainment of the 1997 annual PM<sub>2.5</sub> NAAQS in California.

EPA did not project 2012 design values for the 1997 24-hour PM<sub>2.5</sub> NAAQS in the Western States Design Values Memo. EPA therefore used the most recent AQS monitoring data to determine the monitor nearest to Colorado with a design value above the 1997 24-hour PM<sub>2.5</sub> NAAQS. Based on recent monitoring data (2009 design values), the highest 24-hour PM<sub>2.5</sub> design value in 47 of the 48 states of the continental U.S. (not including California) is 50 µg/m<sup>3</sup>, which is well below the level of the 1997 24-hour PM<sub>2.5</sub> NAAQS of 65 µg/m<sup>3</sup>.<sup>31</sup> In California, the most recent (2009) 24-hour PM<sub>2.5</sub> design values show that the monitor nearest Colorado that might be violating the 1997 24-hour PM<sub>2.5</sub> NAAQS is in Bakersfield.<sup>32</sup> Transport of emissions from Colorado sources to PM<sub>2.5</sub> receptors in Bakersfield is very unlikely, based on a similar weight-of-evidence analysis as for San Bernardino above. Bakersfield is roughly 570 miles from the nearest Colorado border. The topography between Colorado sources and California monitors is largely

<sup>29</sup> Western States Design Values Memo, Appendix A.

<sup>30</sup> *Id.*

<sup>31</sup> Data from EPA's Air Quality System, which is EPA's repository of ambient air quality data. (See <http://www.epa.gov/ttn/airs/airsaqs/>).

<sup>32</sup> The AQS design value data shows 2009 design values in Bakersfield of roughly 70 µg/m<sup>3</sup>.

mountainous, presenting an obstacle to transport of emissions. Winds typically travel west to east in the western United States, making transport of emissions from Colorado to California unlikely. Under the weight-of-evidence approach, these factors combined lead EPA to the conclusion that significant contribution from Colorado sources to 24-hour PM<sub>2.5</sub> nonattainment monitors in California is very unlikely.

In conclusion, our analysis indicates that emissions of PM<sub>2.5</sub> and/or its precursors from the sources in Colorado are unlikely to contribute significantly to nonattainment of the 1997 24-hour and annual PM<sub>2.5</sub> NAAQS in any other state.

### C. EPA's Evaluation of Colorado's Interference With Maintenance

As discussed above, following the 2006 Guidance and consistent with EPA's approach in CAIR, Colorado's submission for section 110(a)(2)(D)(i) for the 1997 PM<sub>2.5</sub> NAAQS did not evaluate whether emissions from the sources in the state interfere with maintenance of these NAAQS by other states, separately from evaluation of significant contribution to nonattainment in other states. Instead, the State presumed that if Colorado sources did not significantly contribute to violations of the NAAQS in other states, then no further specific evaluation was necessary for purposes of the interference with maintenance element of section 110(a)(2)(D)(i)(I). As explained above, however, CAIR was remanded to EPA, in part because the court found that EPA had failed to give independent meaning to the "interfere with maintenance" requirement, a concern that EPA has addressed in the Transport Rule Proposal. However, Colorado submitted its Interstate Transport SIP without the benefit of EPA's new approach. Accordingly, we are evaluating the state's submission using additional information to address the issue of interference with maintenance.

In particular, EPA has developed an approach to identify those monitors for PM<sub>2.5</sub> that are located in areas appropriate for consideration as receptors for evaluating the potential for interference with maintenance of the 1997 PM<sub>2.5</sub> NAAQS. As discussed in more detail above in section A, EPA has examined data from existing monitors for three overlapping three year periods to predict what areas may have difficulty attaining the NAAQS in 2012. By identifying these monitors, EPA can then use available analytical tools to determine whether emissions from sources in a state are having an impact

on other states, and the degree of that impact.

EPA did not model the contribution of emissions from Colorado sources (because Colorado and other western states are not fully inside the Transport Rule Proposal's modeling domain) to PM<sub>2.5</sub> maintenance receptors in other states. Therefore, EPA's assessment of whether emissions from Colorado sources interfere with maintenance in other states relies on a weight-of-evidence approach that considers relevant information (such as identification of maintenance receptors and estimates of PM<sub>2.5</sub> contributions) from the Transport Rule Proposal pertaining to states within its modeling domain, modeling analysis results from other studies, additional material such as geographical, topographical and meteorological factors, and back trajectory analyses. While conclusions reached for each of the factors considered in the following analysis are not themselves determinative, consideration of these factors together provides a reliable qualitative conclusion that emissions from Colorado are not likely to interfere with maintenance of the 1997 PM<sub>2.5</sub> NAAQS at monitors in other states.

It should be noted that the maintenance receptors analyzed are separate from the nonattainment receptors analyzed for purposes of significant contribution to nonattainment. EPA is evaluating impacts on these monitors specifically to address the independent interference with maintenance requirement of section 110(a)(2)(D)(i)(I). However, the maintenance receptors in Cook County, IL are geographically close to the nonattainment receptors in that same county, especially relative to the distance from Colorado. The following analysis therefore uses similar evidence to evaluate interference with maintenance as that used for the evaluation of the potential for significant contribution to nonattainment. EPA uses similar evidence only because these nonattainment and maintenance receptors are in similar locations, and recognizes that the two types of receptors are analytically distinct.

In connection with the Transport Rule Proposal, EPA evaluated monitor data for states within the geographic scope of that rulemaking to project future concentrations of PM<sub>2.5</sub> to identify receptors that are expected to have difficulty maintaining compliance with the NAAQS in 2012, referred to as maintenance receptors. For the 1997 annual PM<sub>2.5</sub> NAAQS, this analysis identified 16 maintenance receptors in

its modeling analysis domain (i.e. states east of the Rocky Mountains). The maintenance receptors for the 1997 PM<sub>2.5</sub> NAAQS nearest to Colorado are two monitoring sites located in Cook County, Illinois in the Chicago area, and a monitoring site in Harris County, Texas, in the Houston-Galveston-Brazoria area. For the 1997 24-hour PM<sub>2.5</sub> NAAQS, EPA did not evaluate maintenance receptors because there were no violations of these standards in the 37 states east of the Rockies.<sup>33</sup>

EPA analyzed contribution of annual PM<sub>2.5</sub> emissions from Colorado sources to maintenance receptors in Cook County, Illinois using the same evidence as was used in Section B of this action to determine the potential impact of Colorado sources on the projected nonattainment receptor in the same county. As noted in that section, modeling conducted for the 2004 CAIR Proposal projected 2010 emissions from Colorado sources to contribute 0.03 µg/m<sup>3</sup> annual PM<sub>2.5</sub> emissions to Cook County, just 20% of the significance threshold (0.15 µg/m<sup>3</sup>) for interference with maintenance used in the Transport Rule Proposal for the 1997 annual PM<sub>2.5</sub> NAAQS. The CAIR Proposal modeling therefore provides the initial evidence—not determinative by itself—that emissions from Colorado sources are not likely to interfere with maintenance of the annual PM<sub>2.5</sub> NAAQS in Cook County, IL.

Portions of the modeling analysis and projected emission levels calculated for the Transport Rule Proposal provide further evidence for the conclusion that emissions from Colorado sources are unlikely to interfere with maintenance at the Cook County, IL receptors. As noted above, in the Transport Rule Proposal, EPA did not directly model the impacts of emissions from Colorado, but EPA did model the impacts of emissions from other states that are within the modeling domain for the Transport Rule Proposal. Kansas and Nebraska were among the states whose interstate contribution to annual PM<sub>2.5</sub> maintenance receptors in other states EPA did model for the Transport Rule Proposal.<sup>34</sup> Neither of these two states

<sup>33</sup> Areas east of the Rockies were modeled for the Transport Rule Proposal using a 12km grid. Areas west of the Rockies were modeled using a 36km grid. EPA did not model projections for the 24-hour PM<sub>2.5</sub> NAAQS in the 36km grid modeling domain. For the states included in the eastern domain, see Table IV.C-13, Transport Rule Proposal, 75 FR at 45255-56.

<sup>34</sup> As technical support for the Transport Rule Proposal, all 48 contiguous states were modeled using a horizontal grid resolution of 36 x 36 km. States in the eastern U.S. modeled for contribution in the Transport Rule Proposal, including Kansas and Nebraska, were also modeled using a finer



(Kansas or Nebraska) was projected to contribute more than  $0.06 \mu\text{g}/\text{m}^3$ ,<sup>35</sup> or 40% of the significance threshold, to any maintenance receptor covered by the Transport Rule Proposal, which included the Cook County, IL monitors.

For the Transport Rule Proposal, EPA projected total emissions for  $\text{NO}_x$  and  $\text{SO}_2$ , the two major precursors for  $\text{PM}_{2.5}$ , for each of the 48 contiguous states in 2012 and 2014. Nebraska and Kansas were each projected to have similar amounts of  $\text{PM}_{2.5}$  precursor emissions ( $\text{NO}_x$  and  $\text{SO}_2$ ) to those of Colorado.<sup>36</sup> Both states are also upwind of Cook County, IL, but are much closer to the Cook County maintenance receptors than is Colorado.<sup>37</sup> Distance by itself is not an obstacle to long range transport of  $\text{PM}_{2.5}$  and/or its precursors, and is therefore not determinative of interference with maintenance. However, with increasing distance there are greater opportunities for  $\text{PM}_{2.5}$  or precursor dispersion and/or removal from the atmosphere due to the effect of winds or chemical sink processes. In summary, EPA-projected  $\text{PM}_{2.5}$  precursor emissions from Colorado are lower or similar to those in Kansas or Nebraska, and, based on geography and meteorology, emissions from each of these states are more likely to reach maintenance receptors in the eastern U.S. than are emissions from Colorado. Therefore, because Kansas and Nebraska are each well below the significance threshold for interference with maintenance for the annual  $\text{PM}_{2.5}$  NAAQS in the Transport Rule Proposal, Colorado is likely to be even further below the significance threshold. Based on the modeling analysis from the CAIR Proposal and the Transport Rule Proposal, the weight of evidence shows that it is very unlikely that emissions from Colorado sources would interfere with maintenance of the 1997 annual  $\text{PM}_{2.5}$  NAAQS at any monitor in Cook County, IL.

EPA did not calculate the impact of Colorado's emissions on the Houston area as part of the CAIR modeling

horizontal grid resolution of  $12 \times 12 \text{ km}$ . Contribution was determined using zero-out modeling.

<sup>35</sup> Transport Rule Proposal, 75 FR at 47255 (Table IV.C-13).

<sup>36</sup> See "Technical Support Document (TSD) for the Transport Rule Docket ID No. EPA-HQ-OAR-2009-0491. Emission Inventories" at 40-43 (June 2010). Based on these projections, in 2012, Kansas will have higher  $\text{NO}_x$  (~24%) and  $\text{SO}_2$  (~35%) emissions than Colorado, and Nebraska will have lower  $\text{NO}_x$  (~23%) and higher  $\text{SO}_2$  (~94%) emissions than Colorado.

<sup>37</sup> At the shortest possible distance for each measurement, the eastern Colorado border is approximately 320 miles west of the eastern Nebraska border and 370 miles west of the eastern Kansas border.

analysis or the Transport Rule Proposal modeling analysis. EPA is therefore using other evidence in a weight-of-evidence assessment to determine if Colorado emissions interfere with maintenance of the 1997 annual  $\text{PM}_{2.5}$  NAAQS at the Harris County monitor. Our assessment considers modeling analysis from the Transport Rule Proposal, geographical and meteorological factors, and back trajectory analyses.

Oklahoma was among the states EPA modeled for the Transport Rule Proposal to estimate their interstate contribution of annual  $\text{PM}_{2.5}$  emissions to nonattainment and maintenance monitors in other states. Oklahoma's estimated maximum contribution to any maintenance monitor covered by the Transport Rule Proposal, which included the Harris County, TX monitor, was  $0.05 \mu\text{g}/\text{m}^3$ ,<sup>38</sup> or 33% of the significance threshold.

Back trajectory analysis indicates that air parcel pathways that reach Houston will pass through Oklahoma more frequently than they will pass through Colorado.<sup>39</sup> Because back trajectory analysis results map pathways of air parcels that may or may not transport pollutants, they cannot be considered determinative as to the transport of  $\text{PM}_{2.5}$  and its precursors, or of the absence of such transport, from Colorado sources. However, this back trajectory analysis provides evidence that  $\text{PM}_{2.5}$  emissions and  $\text{PM}_{2.5}$  precursor emissions from Oklahoma are more likely to reach Houston than Colorado emissions, based simply on wind patterns. In addition, emissions from Oklahoma sources travel a much shorter distance to the Houston area than emissions from Colorado sources.<sup>40</sup> Furthermore, the emissions of  $\text{SO}_2$  and  $\text{NO}_x$ , the two major  $\text{PM}_{2.5}$  precursors, are significantly lower in Colorado than in Oklahoma.<sup>41</sup> The weight of evidence from these factors combined shows that emissions from Oklahoma sources are much more likely to reach the Houston area than are emissions from Colorado sources. Given that Oklahoma is far

<sup>38</sup> Transport Rule Proposal, 75 FR at 45255 (Table IV.C-13).

<sup>39</sup> See "Eight-Site SA Speciation Trends Final Report. Appendix G: Graphical Representation of the Source Apportionment Results for Houston, Texas," (September 24, 2003), available in the docket for this action.

<sup>40</sup> The Houston area is approximately 270 miles from the nearest Oklahoma border. The Houston area is approximately 630 miles from the nearest Colorado border.

<sup>41</sup> See "Technical Support Document (TSD) for the Transport Rule Docket ID No. EPA-HQ-OAR-2009-0491. Emission Inventories" at 40-43 (June 2010). Based on these projections, Oklahoma will have higher  $\text{NO}_x$  (~54%) and  $\text{SO}_2$  (~147%) emissions than Colorado in 2012.

below the Transport Rule Proposal threshold for interference with maintenance at annual  $\text{PM}_{2.5}$  maintenance receptors, including the Harris County receptor, the weight of evidence shows it is highly unlikely that Colorado sources will interfere with maintenance of the 1997 annual  $\text{PM}_{2.5}$  NAAQS at the Harris County receptor.

As discussed above in section B, EPA developed the Western States Design Values Memo to identify nonattainment and maintenance receptors within a modeling domain that includes the western states.<sup>42</sup> The Western States Design Values Memo analysis uses the same general approach as the Transport Rule Proposal (5 year weighted average design values to project 2012 concentrations) to project nonattainment and maintenance receptors.<sup>43</sup> For the 1997 annual  $\text{PM}_{2.5}$  NAAQS, the two maintenance receptors identified in the Western States Design Values Memo are in Orange and Los Angeles counties in California.

Distance and topography, while not determinative in of themselves, indicate that  $\text{PM}_{2.5}$  and precursor transport from Colorado to California is unlikely. The southwestern corner of the Colorado border is approximately 545 miles from Anaheim, the city with the nearest maintenance receptor for these NAAQS. The mountainous topography between Colorado sources and California maintenance receptors also presents a large obstacle to  $\text{PM}_{2.5}$  transport. Thus, geography and topography significantly reduce the likelihood of transport from Colorado to California's maintenance receptors.

Prevailing wind orientation also provides strong evidence that Colorado's emissions are unlikely to interfere with maintenance of the 1997 annual  $\text{PM}_{2.5}$  standards in California. West of the Continental Divide the prevailing winds generally move from south-westerly, westerly, or north-westerly directions, as indicated by the typical movement of weather systems. In addition, projected design values presented in the Western States Design Values Memo provide some evidence that interference with maintenance by emissions from Colorado sources to maintenance receptors for the 1997 annual  $\text{PM}_{2.5}$  NAAQS in California is unlikely. The highest projected average  $\text{PM}_{2.5}$  design value for 2012 in Colorado is  $9.36 \mu\text{g}/\text{m}^3$ , or 64% of the 1997 annual  $\text{PM}_{2.5}$  NAAQS.<sup>44</sup> The highest

<sup>42</sup> Western States Design Values Memo.

<sup>43</sup> *Id.* at 5.

<sup>44</sup> Western States Design Values Memo, Appendix A.

projected average PM<sub>2.5</sub> design value for 2012 throughout Utah, Arizona and Nevada, the states between Colorado and California, is 12.7 µg/m<sup>3</sup>, or 84.6% of the NAAQS.<sup>45</sup> Given the distance between Colorado sources and California maintenance receptors, the intervening mountainous topography, the general west-to-east direction of transport winds in the western U.S., and the low level of emissions from Colorado sources, EPA concludes that Colorado sources are not likely to interfere with maintenance of the 1997 annual PM<sub>2.5</sub> NAAQS in California.

EPA did not project 2012 design values for the 1997 24-hour PM<sub>2.5</sub> NAAQS in the Western States Design Values Memo. Based on recent monitoring data (2009 design values), the highest 24-hour PM<sub>2.5</sub> design value in 47 of the 48 states of the continental U.S. (not including California) is 50 µg/m<sup>3</sup>, which is well below the level of the 1997 24-hour PM<sub>2.5</sub> NAAQS of 65 µg/m<sup>3</sup>.<sup>46</sup> Therefore, outside of California, there are no areas that we would expect to have difficulty in maintaining the 1997 24-hour PM<sub>2.5</sub> NAAQS. In California, the most recent (2009) 24-hour PM<sub>2.5</sub> design values show that the only monitors that might be at risk for maintenance of the 1997 24-hour PM<sub>2.5</sub> NAAQS are in Turlock, Fresno, and Bakersfield, in the northern, central and southern sections of the San Joaquin Valley.<sup>47</sup> Of these, the monitor located in Bakersfield is nearest Colorado.

Transport of emissions from Colorado sources to potential PM<sub>2.5</sub> maintenance receptors in Bakersfield, or any monitors in California further west, is very unlikely, based on a weight-of-evidence analysis. Bakersfield is roughly 570 miles from the nearest Colorado border. The topography between Colorado sources and California monitors is largely mountainous, presenting an obstacle to transport of emissions. Transport winds typically travel west to east in the western United States, making transport

of emissions from Colorado to California unlikely. These factors combined lead EPA to the conclusion that interference with maintenance by Colorado sources at 1997 PM<sub>2.5</sub> NAAQS maintenance receptors in California is very unlikely.

In conclusion, our analysis of the weight of evidence indicates that emissions of PM<sub>2.5</sub> and/or its precursors from the sources in Colorado are unlikely to interfere with maintenance of the 1997 24-hour and the annual PM<sub>2.5</sub> NAAQS by any other state.

*D. EPA's Evaluation of Colorado's Prevention of Significant Deterioration (PSD)*

The third element of section 110(a)(2)(D)(i) requires a SIP to contain adequate provisions prohibiting emissions that interfere with any other state's required measures to prevent significant deterioration of its air quality (CAA section 110(a)(2)(D)(i)(II)). EPA's 2006 Guidance made recommendations to states for making SIP submissions to meet this requirement with respect to both the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS.

The 2006 Guidance states that the PSD requirement of section 110(a)(2)(D)(i)(II) may be met by the State's confirmation in a SIP submission that new major sources and major modifications in the State are subject to PSD and (if the State contains a nonattainment area for the relevant pollutant) Nonattainment New Source Review (NNSR) programs that implement the relevant standards.<sup>48</sup> The Guidance explains that the requirements for PSD and NNSR programs include provisions that protect air quality in other states. Specifically, a PSD permit may not be issued unless the new or modified source demonstrates that emissions from the construction or operation of the facility will not cause or contribute to air pollution in any area—including areas in other States—that exceeds any NAAQS or any maximum allowable increase (i.e., PSD

increment).<sup>49</sup> An NNSR permit may not be issued unless the new or modified source shows it has obtained sufficient emissions reductions to offset increases in emissions of the pollutants for which an area is designated nonattainment, consistent with reasonable further progress toward attainment.<sup>50</sup> Because the PSD and NNSR permitting programs currently applicable in each area require a demonstration that new or modified sources will not cause or contribute to air pollution in excess of the NAAQS in neighboring states or that sources in nonattainment areas procure offsets, States may satisfy the requirement of section 110(a)(2)(D)(i)(II) regarding other States' required measures to prevent significant deterioration of air quality by submitting SIPs confirming that new major sources and major modifications in the State are subject to PSD and (if applicable) NNSR programs that implement the relevant standards.

1. PSD and NNSR SIP Requirements for the 1997 8-Hour Ozone NAAQS

On November 29, 2005, EPA published the Phase 2 implementation rule for the 1997 8-hour ozone NAAQS ("Phase 2 Rule").<sup>51</sup> For ozone nonattainment areas, the Phase 2 Rule requires revisions to States' NNSR SIPs to implement the requirements of the CAA Amendments of 1990, as applicable based on each area's classification for the ozone standard.<sup>52</sup> Specifically, the Phase 2 Rule requires that NNSR SIPs apply all NNSR requirements that apply to major sources of volatile organic compounds (VOCs) to major NO<sub>x</sub> emissions sources, except where a NO<sub>x</sub> waiver applies under section 182(f) of the Act.<sup>53</sup> In addition, NNSR SIPs must include provisions establishing the applicable major stationary source thresholds, significant emissions rates, and offset ratios for VOCs and NO<sub>x</sub> based on each area's classification, as listed in Table 1.<sup>54</sup>

TABLE 1—VOC AND NO<sub>x</sub> THRESHOLDS AND OFFSET RATIOS BY OZONE CLASSIFICATION

Classification	Subpart 1 <sup>55</sup>	Marginal	Moderate	Serious	Severe	Extreme
Major Source (tons per year (tpy))	100	100	100	25	25	10.
Significant Emissions Rate (tpy)	40	40	40	25	25	0.
Offset Ratio <sup>56</sup>	1 to 1	1.1 to 1	1.15 to 1	1.2 to 1	1.3 to 1	1.5 to 1.

<sup>45</sup> *Id.*

<sup>46</sup> Data from EPA's Air Quality System, which is EPA's repository of ambient air quality data. (See <http://www.epa.gov/ttn/airs/airsaqs/>).

<sup>47</sup> The AQS design value data shows that in 2009 design values at monitors in these locations ranged

from 60 µg/m<sup>3</sup> in Fresno and Turlock, to 70 µg/m<sup>3</sup> in Bakersfield.

<sup>48</sup> 2006 Guidance at 6.

<sup>49</sup> 42 U.S.C. 7475(a)(3); 40 CFR 51.166(k).

<sup>50</sup> 42 U.S.C. 7503(a)(1); 40 CFR 51.165(a)(3).

<sup>51</sup> 70 FR 71612.

<sup>52</sup> See 70 FR at 71675, 71698–99.

<sup>53</sup> 40 CFR 51.165(a)(8).

<sup>54</sup> 40 CFR 51.165(a)(1)(iv), (a)(1)(v), (a)(1)(x), (a)(8), (a)(9).

For areas designated unclassifiable/attainment for the 1997 ozone NAAQS, the Phase 2 Rule requires revisions to PSD SIPs to require explicit identification of NO<sub>x</sub> as an ozone precursor.<sup>57</sup> States were required to submit the relevant PSD and NNSR SIP revisions to address the 1997 8-hour ozone NAAQS by June 15, 2007.<sup>58</sup> In the 2006 Guidance, issued before the deadline for States to submit the SIP revisions described above, EPA recommended States make a submission confirming they were on track to meet this deadline. At that point, Colorado had no areas designated nonattainment for ozone. However, on November 20, 2007, the Denver Metropolitan Area/North Front Range (“DMA/NFR”) area was designated nonattainment for the

1997 8-hour ozone standard and, consistent with the approach taken in the Phase 1 ozone implementation rule,<sup>59</sup> was made subject solely to the requirements of subpart 1 discussed above. Subsequently, the D.C. Circuit Court of Appeals vacated those elements of EPA’s Phase 1 ozone implementation rule that placed areas solely under the implementation requirements of subpart 1.<sup>60</sup> As a result, areas such as the DMA/NFR are now referred to as “former subpart 1 areas.” EPA has proposed to classify the DMA/NFR under subpart 2 of part D, title I of the Act as a “marginal” area but has not yet finalized this rulemaking.<sup>61</sup> In the interim, the DMA/NFR area is still subject to the subpart 1 requirements discussed above.

In Colorado’s March 31, 2010 submission, the State cites August 17, 2006 revisions to Colorado Regulation No. 3 Part D to assert that they are on track to meet the requirements of the Phase 2 Rule within three years of the DMA/NFR November 20, 2007 nonattainment designation. In this action, EPA proposes to approve portions of the August 17, 2006 revisions, submitted to EPA August 1, 2007, that implement the Phase 2 Rule. Specifically, we propose approval of the sections that adopt language to treat nitrogen oxides as an ozone precursor. Other portions of the August 17, 2006 revisions are being acted upon separately. The sections that we propose to approve are set out in the table below.

Provision location in Colorado’s 8/17/06 Reg 3 Revision	Description of provision—language adopted August 17, 2006 to conform to the Phase II Ozone Implementation Rule is <i>underlined</i>	Corresponding provision in 40 CFR 51.166
D—II.A.22.a .....	Significant Emissions Increase or Net Emissions Increase (at a major source) that is significant for VOCs or NO <sub>x</sub> is significant for ozone.	40 CFR 51.166(b)(2)(ii).
D—II.A.24.d .....	Major source that is major for VOCs or NO <sub>x</sub> is major for ozone .....	40 CFR 51.166(b)(1)(ii).
D—II.A.38.c .....	VOCs and NO <sub>x</sub> are precursors for ozone .....	40 CFR 51.166(b)(49)(i).
D—II.A.42.a .....	Significant rate of emissions for ozone means 40 tons per year of VOCs or NO <sub>x</sub> .	40 CFR 51.166(b)(23)(i).

These revisions are contained with Colorado’s rules for its SIP-approved PSD program. Colorado also has a generic SIP-approved NNSR program that applies in any nonattainment area and that relies on the definitions provided in the PSD program, but separately imposes requirements that sources achieve the lowest achievable emission rate (“LAER”) and obtain offsets in a ratio greater than one to one. As a result of the structure of Colorado’s NNSR program, the revisions to the PSD program discussed above also apply to it. Under these revisions, the State’s SIP-approved NNSR program meets the currently applicable requirements of the Phase 2 Rule (prior to reclassification of the DMA/NFR nonattainment area) and satisfies the requirements for the PSD element of 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS.

Colorado’s March 31, 2010 Interstate Transport SIP submission is consistent with the 2006 Guidance, when considered in conjunction with the

Colorado PSD program revisions that EPA is also proposing to approve in this action. EPA’s proposed approval of Colorado’s Interstate Transport SIP for the purposes of meeting the third element of section 110(a)(2)(D)(i) is contingent upon the final approval of the PSD program revisions in the form specified in EPA’s proposed approval, referenced above. Colorado’s SIP regulations for its PSD program were federally-approved and made part of the SIP on September 2, 1986.<sup>62</sup> EPA is proposing to approve, concurrent with this action, Colorado’s PSD rule revisions incorporating into the State’s regulations the provisions of EPA’s November 29, 2005 Phase 2 rule that treat NO<sub>x</sub> as a precursor for ozone for the 1997 8-hour ozone NAAQS.<sup>63</sup>

2. PSD SIP Requirements for the 1997 PM<sub>2.5</sub> NAAQS

Colorado has no areas designated nonattainment for PM<sub>2.5</sub> and correspondingly no NNSR program for

PM<sub>2.5</sub>. EPA thus considers only whether Colorado’s SIP-approved PSD program satisfies the requirements of the PSD element of 110(a)(2)(D)(i) for the 1997 PM<sub>2.5</sub> NAAQS. First, the 2006 Guidance noted that EPA had not yet established PSD increments for PM<sub>2.5</sub> and therefore, at that point it was difficult for states to determine if additional measures were needed to satisfy the requirements of the PSD element of section 110(a)(2)(D)(i). However, in a final rule published October 20, 2010, EPA established PM<sub>2.5</sub> increments.<sup>64</sup> EPA set an applicability date of October 20, 2011 for the new increments and required States with SIP-approved PSD programs to submit updates incorporating these increments by July 20, 2012.<sup>65</sup> At this point, though, incorporation of the PM<sub>2.5</sub> increments is not required to satisfy the PSD element of section 110(a)(2)(D)(i).

The 2006 Guidance also discusses the use of PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub> in PSD programs. As recommended in the 2006 Guidance, Colorado’s SIP declares

<sup>55</sup> Although the “subpart 1” category is not a classification, the general requirements of subpart 1, part D of title I of the CAA apply in all ozone nonattainment areas (to the extent they are not superseded by the more specific requirements of subpart 2), including those areas now referred to as “former subpart 1 areas” under the DC Circuit Court of Appeals’ vacatur of certain elements of EPA’s Phase 1 ozone implementation rule. See *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (DC Cir. 2006), reh’g denied, 489 F.3d 1245 (clarifying

that the vacatur was limited to the issues on which the court granted the petitions for review).

<sup>56</sup> For any nonattainment area classified as severe or extreme, if the approved plan requires all existing major sources in such an area to use BACT to control VOC and NO<sub>x</sub>, then the ratio must be at least 1.2 to 1. CAA sections 182(d)(2), (e)(1) and 182(f).

<sup>57</sup> See 70 FR at 71679, 71699–700; 40 CFR 51.166(b)(1)(ii), (b)(2)(ii), (b)(23)(i).

<sup>58</sup> 70 FR at 71683.

<sup>59</sup> See 69 FR at 23951 (Apr. 30, 2004).

<sup>60</sup> See *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (DC Cir. 2006), reh’g denied, 489 F.3d 1245.

<sup>61</sup> 74 FR 2936, 2944 (Jan. 16, 2009).

<sup>62</sup> 51 FR 31125.

<sup>63</sup> 70 FR at 71698–700.

<sup>64</sup> 75 FR 64864.

<sup>65</sup> *Id.* at 64887–88, 64898.

that the State will follow EPA's interim guidance on use of PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub>.<sup>66</sup> In response to EPA's request of December 1, 2010, the Colorado Air Pollution Control Division, in a January 13, 2011 letter to the EPA Region 8 Air Program, has clarified an ambiguity in its interpretation of the interim guidance.<sup>67</sup> The letter states that, until the guidance is ended or replaced, Colorado will apply it consistent with EPA's interpretation of the federal case law relevant to the use of the PM<sub>10</sub> Surrogate Policy.<sup>68</sup> The State will also take into account the limits provided in the policy itself, such as the need to identify the technical difficulties that justify the application of the policy in each specific case.<sup>69</sup> With that clarification, the Colorado Interstate Transport SIP satisfies the requirements of the third element of section 110(a)(2)(D)(i) for the 1997 PM<sub>2.5</sub> NAAQS.

### 3. PSD SIP Requirements for Greenhouse Gases

EPA notes a potential inconsistency between Colorado's Interstate Transport SIP submission and EPA's recently promulgated rule, "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans" ("PSD SIP Narrowing Rule").<sup>70</sup> In the PSD SIP Narrowing Rule, EPA withdrew its previous approval of Colorado's PSD program to the extent that it applied PSD permitting to greenhouse gas (GHG) emissions increases from GHG-emitting sources below thresholds set in EPA's June 3, 2010 "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" ("Tailoring Rule").<sup>71</sup> EPA withdrew its approval on the basis that the State lacked sufficient resources to issue PSD permits to such sources at the statutory thresholds in effect in the previously-approved PSD program. After the PSD SIP Narrowing Rule, the portion of Colorado's PSD SIP from which EPA withdrew its approval had the status of having been submitted to EPA but not yet acted upon. In Colorado's March 31, 2010 submission, Colorado relied on its PSD program as approved at that date—which was before December 30, 2010, the effective date of the PSD SIP Narrowing Rule—

to satisfy the "interference with PSD" requirements of 110(a)(2)(D)(i). Given EPA's basis for the PSD SIP Narrowing Rule, EPA proposes approval of the Colorado Interstate Transport SIP submission in its entirety if either the State clarifies (or modifies) its submission to make clear that the State relies only on the portion of the PSD program that remains approved after the PSD SIP Narrowing Rule issued on December 30, 2010, and for which the State has sufficient resources to implement, or the State acts to withdraw from EPA consideration the remaining portion of its PSD program submission that would have applied PSD permitting to GHG sources below the Tailoring Rule thresholds.<sup>72</sup> In the alternative, if Colorado does not take either action, EPA proposes to disapprove the Interstate Transport SIP to the extent it incorporates that portion of the previously-approved PSD program from which EPA withdrew its approval in the PSD SIP Narrowing Rule, which is the portion which would have applied PSD permitting requirements to GHG emissions increases from GHG-emitting sources below the Tailoring Rule thresholds. Such disapproval, if finalized, would not result in a need for Colorado to resubmit a SIP revision, sanctions, or a federal implementation plan (FIP).<sup>73</sup>

### VI. Summary of Proposed Action

In light of the data and the weight-of-evidence analysis presented above, EPA is proposing approval of portions of the Colorado Interstate Transport SIP addressing the requirements of CAA section 110(a)(2)(D)(i) for the 1997 PM<sub>2.5</sub> and 8-hour ozone NAAQS. On January 13, 2010, the Colorado AQCC adopted interstate transport SIP revisions addressing requirements (3) and (4) of CAA section 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS, and all four requirements of CAA section 110(a)(2)(D)(i) for the 1997 PM<sub>2.5</sub> NAAQS. Colorado submitted these revisions to EPA on March 31, 2010. Specifically, EPA is proposing to approve the language and demonstration of the March 31, 2010 submission that addresses three requirements of section 110(a)(2)(D)(i) with respect to the 1997 PM<sub>2.5</sub> NAAQS: (1) Prohibition of significant contribution to nonattainment of the NAAQS in any other state, (2) prohibition of interference with maintenance of the NAAQS by any other state, and (3) prohibition of

interference with other states' required measures to prevent significant deterioration of air quality. EPA is also proposing to approve the language and demonstration that addresses requirement (3) of section 110(a)(2)(D)(i)—prohibition of interference with other states' required measures to prevent significant deterioration of air quality—with respect to the 1997 8-hour ozone NAAQS.

### VII. Statutory and Executive Order Review

Under the Clean Air Act, 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 Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

<sup>66</sup> See 2006 Guidance at 7.

<sup>67</sup> Letter from Paul Tourangeau, Director, Colorado APCD, Clarifying use of PM<sub>10</sub> Surrogacy Policy (Jan 13, 2011), available in the docket for this action.

<sup>68</sup> See 75 FR 6827, 6831-32 (Feb. 11, 2010).

<sup>69</sup> *Id.* at 6834.

<sup>70</sup> 75 FR 82536 (Dec. 30, 2010).

<sup>71</sup> 75 FR 31514.

<sup>72</sup> EPA specified how to accomplish this in the PSD SIP Narrowing Rule, 75 FR at 82538, 82540.

<sup>73</sup> *Id.*

appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

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

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile Organic Compounds.

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

Dated: April 12, 2011.

**Carol Rushin,**

*Acting Regional Administrator, Region 8.*

[FR Doc. 2011-9451 Filed 4-18-11; 8:45 am]

**BILLING CODE 6560-50-P**

## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 204, 212, and 252

RIN 0750-AH02

#### Defense Federal Acquisition Regulation Supplement (DFARS), Alternative Line-Item Structure (DFARS Case 2010-D017)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to establish a standard procedure for offerors to propose an alternative line-item structure that reflects the offeror's business practices for selling and billing commercial items and initial provisioning spares for weapon systems. A new solicitation provision is provided to facilitate offerors' ability to propose such changes to the solicitation structure in their offer.

**DATES:** Comments on this proposed rule should be submitted in writing to the address shown below on or before June 20, 2011, to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2010-D017, using any of the following methods:

- **Regulations.gov:** <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "DFARS Case 2010-D017" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2010-D017." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2010-D017" on your attached document. Follow the instructions for submitting comments.

- **E-mail:** [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2010-D017 in the subject line of the message.

- **Fax:** 703-602-0350.

- **Mail:** Defense Acquisition Regulations System, Attn: Mr. Julian Thrash, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <http://www.regulations.gov> approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Mr. Julian Thrash, 703-602-0310.

#### I. Background

DoD is proposing to add new DFARS language that provides offerors the opportunity to propose an alternative line-item structure in solicitations for commercial items and initial provisioning spares. This proposed DFARS change will allow offerors to provide information about their products that may not have been known to the Government prior to issuance of the solicitation.

DoD identified the need to propose an alternative line-item structure during process reviews and working group sessions that assessed destination-acceptance procedures. The process reviews performed by DoD cross-service working groups, which were chartered by the Defense Finance and Accounting System, examined issues causing problems in the receipt and acceptance phase for contract deliverables and payments.

This group determined that the level of detail in the requirements description and line-item structure is not always sufficient for delivery, payment, and

subsequent inventory management of the items delivered. For example, the contract line item may be for a desktop computer, but the actual items delivered, invoiced, and inventoried may reflect a separate monitor, keyboard, and central processing unit. The resultant misalignment of transaction detail (*i.e.*, contract line item, invoiced unit, delivery and inventory unit) is the cause of failures in the electronic processes of the DoD's business enterprise requiring manual intervention with potential delays in contractor payment.

To address this recurring problem, this rule is establishing and standardizing a process to enable offerors to propose changes in their offer to the solicitation's line-item structure. Establishing such a process is a first step towards managing variation in these transactions by eliminating or reducing manual intervention.

#### II. Proposed DFARS Changes

DoD is proposing to revise the DFARS by adding—

- Paragraph (g) at 204.7103-1, Criteria for establishing;
- A provision prescription at 204.7109(b);
- Reference to the new provision at 212.301 Solicitation provisions and contract clauses for the acquisition of commercial items; and
- A provision at 252.204-70XX, Alternative Line-Item Structure.

Although DoD believes the authority to use an alternative line-item structure currently exists within the Federal Acquisition Regulation (FAR), offerors may not be aware of, or be reluctant to use, this authority to propose an alternative line-item structure. For example—

- FAR 15.203(a)(2) permits the contracting officer to authorize offerors to propose alternative terms, conditions, and contract line-item number structure.
- FAR 12.213, Other Commercial Practices, encourages the contracting officer to consider other commercial practices for incorporation into the solicitation and contract, if appropriate. FAR 52.212-1(e), Instructions to Offerors—Commercial Items, Multiple Offers, encourages offerors to submit multiple offers presenting alternative terms and conditions for commercial items for satisfying the requirements of the solicitation.

Notwithstanding the above, offerors may not understand that they have this latitude as they are not proposing alternate line-item structure to reflect