

Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; and 64.022, Veterans Home Based Primary Care.

#### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on February 28, 2012, for publication.

#### List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Health care, Health facilities, Mental health programs, Nursing homes, Veterans.

Dated: March 1, 2012.

#### Robert C. McFetridge,

Director, Office of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons set forth in the preamble, we propose to amend 38 CFR part 17 as follows:

#### PART 17—MEDICAL

1. The authority citation for part 17 continues to read as follows:

**Authority:** 38 U.S.C. 501, and as noted in specific sections.

2. Amend § 17.108 by adding paragraph (e)(16) to read as follows:

#### § 17.108 Copayments for inpatient hospital care and outpatient medical care.

\* \* \* \* \*

(e) \* \* \*

(16) In-home video telehealth care.

\* \* \* \* \*

[FR Doc. 2012-5355 Filed 3-5-12; 8:45 am]

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#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 52

[EPA-R10-OAR-2012-0112, FRL-9643-5]

#### Partial Approval and Promulgation of Implementation Plans; Washington: Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to partially approve the State Implementation Plan (SIP) submittal from the Washington State Department of Ecology (Ecology) to demonstrate that the SIP meets the requirements of section 110(a)(1) and (2) of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for ozone on July 18, 1997. EPA is proposing to find that the current Washington SIP meets the following 110(a)(2) infrastructure elements for the 1997 8-hour ozone NAAQS: (A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M), except for portions related to the major source Prevention of Significant Deterioration (PSD) permitting program which is implemented under a Federal Implementation Plan.

**DATES:** Comments must be received on or before April 5, 2012.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R10-OAR-2012-0112, by any of the following methods:

- *www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *Email: R10-Public Comments@epa.gov.*
- *Mail:* Jeff Hunt, EPA Region 10, Office of Air, Waste and Toxics (AWT-107), 1200 Sixth Avenue, Suite 900, Seattle, WA 98101.
- *Hand Delivery/Courier:* EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101. Attention: Jeff Hunt, Office of Air, Waste and Toxics, AWT-107. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA-R10-OAR-2012-0112 EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *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 *www.regulations.gov* or email. The *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 email comment directly to EPA without going through *www.regulations.gov* your email 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.

**Docket:** All documents in the docket are listed in the *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, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Office of Air, Waste and Toxics, EPA Region 10, 1200 Sixth Avenue, Seattle, WA 98101.

**FOR FURTHER INFORMATION CONTACT:** Jeff Hunt at telephone number: (206) 553-0256, email address: *hunt.jeff@epa.gov*, or the above EPA, Region 10 address.

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever "we", "us" or "our" are used, we mean EPA. Information is organized as follows:

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#### I. What action is EPA proposing?

EPA is proposing to partially approve the State Implementation Plan (SIP) submittal from the State of Washington to demonstrate that the SIP meets the requirements of section 110(a)(1) and (2) of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for ozone on July 18, 1997. EPA is proposing to find that the current Washington SIP, as codified at 40 CFR Part 52 Subpart WW meets

the following 110(a)(2) infrastructure elements for the 1997 8-hour ozone NAAQS: (A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M), except for those infrastructure requirements which relate to regulations for preventing significant deterioration (PSD) of air quality, as explained in this Notice. PSD permits are implemented in Washington under a Federal Implementation Plan as specified at 40 CFR 52.2497.

Section 110(a)(1) of the CAA requires that each state, after a new or revised NAAQS is promulgated, review their SIPs to ensure that they meet the requirements of the “infrastructure” elements of section 110(a)(2). The State of Washington submitted a certification to EPA dated January 24, 2012, certifying that Washington’s SIP meets the infrastructure obligations for the 1997 8-hour ozone NAAQS. The certification included an analysis of Washington’s SIP as it relates to each section of the infrastructure requirements with regard to the 1997 8-hour ozone NAAQS. This action does not address the requirements of 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS which were previously addressed and approved by EPA on January 13, 2009 (74 FR 1501).

## II. What is the background for the action that EPA is proposing?

On July 18, 1997, EPA promulgated a new NAAQS for ozone. EPA revised the ozone NAAQS to provide an 8-hour averaging period which replaced the previous 1-hour averaging period, and the level of the NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38856).

The CAA requires SIPs meeting the requirements of sections 110(a)(1) and (2) be submitted by states within 3 years after promulgation of a new or revised standard. Sections 110(a)(1) and (2) require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards, so-called “infrastructure” requirements. States were required to submit such SIPs for the 1997 8-hour ozone NAAQS to EPA no later than June 2000. However, intervening litigation over the 1997 8-hour ozone standard created uncertainty about how to proceed, and many states did not provide the required infrastructure SIP submissions for the newly promulgated standard.

To help states meet this statutory requirement for the 1997 8-hour ozone NAAQS, EPA issued guidance to address infrastructure SIP elements

under section 110(a)(1) and (2).<sup>1</sup> The 2007 Guidance provides that, to the extent an existing SIP already meets the section 110(a)(2) requirements, states need only to certify that fact via a letter to EPA. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state’s federally approved SIP already contains. In the case of the 1997 8-hour ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous ozone standards.

## III. What infrastructure elements are required under sections 110(a)(1) and (2)?

Section 110(a)(1) provides the procedural and timing requirements for SIP submissions after a new or revised NAAQS is promulgated. Section 110(a)(2) lists specific elements that states must meet for “infrastructure” SIP requirements related to a newly established or revised NAAQS. These requirements include SIP infrastructure elements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The requirements, with their corresponding CAA subsection, are listed below:

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.
- 110(a)(2)(D): Interstate transport.
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.
- 110(a)(2)(J): Consultation with government officials; public

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

notification; and Prevention of Significant Deterioration (PSD) and visibility protection.

- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

EPA’s 2007 Guidance clarified that two elements identified in section 110(a)(2) are not governed by the 3 year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within 3 years after promulgation of a new or revised NAAQS, but rather due at the time the nonattainment area plan requirements are due pursuant to CAA section 172. These requirements are: (i) Submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA, and (ii) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. As a result, this action does not address infrastructure elements related to section 110(a)(2)(C) with respect to nonattainment new source review (NSR) or 110(a)(2)(I). This action also does not address the requirements of 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS which EPA previously found to be adequate on January 13, 2009 (74 FR 1501). Furthermore, EPA interprets the section 110(a)(2)(J) provision on visibility as not being triggered by a new NAAQS because the visibility requirements in part C are not changed by a new NAAQS.

EPA is proposing to disapprove Washington’s SIP for those infrastructure elements discussed herein which relate to the major source PSD regulation. Washington’s SIP does not currently include EPA-approved provisions for PSD regulation. Instead PSD regulations are implemented by means of a FIP in Washington which incorporates the requirements of 40 CFR 52.21. See 40 CFR 52.2497. To the extent that Washington’s SIP does not include federally-approvable or approved PSD regulations, Washington’s SIP must be disapproved for those infrastructure elements which relate to PSD regulation. However, because these major source PSD regulations are implemented in the state by means of the FIP, neither Washington nor EPA have additional SIP or FIP obligations arising out of this proposed disapproval.

#### IV. What is the scope of action on infrastructure submittals?

EPA is currently acting upon SIPs that address the infrastructure requirements of CAA section 110(a)(1) and (2) for ozone and PM<sub>2.5</sub> NAAQS for various states across the country. Commenters on EPA's recent proposals for some states raised concerns about EPA statements that it was not addressing certain substantive issues in the context of acting on those infrastructure SIP submissions.<sup>2</sup> The commenters specifically raised concerns involving provisions in existing SIPs and with EPA's statements in other proposals that it would address two issues separately and not as part of actions on the infrastructure SIP submissions: (i) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources, that may be contrary to the CAA and EPA's policies addressing such excess emissions ("SSM"); and (ii) existing provisions related to "director's variance" or "director's discretion" that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA ("director's discretion"). EPA notes that there are two other substantive issues for which EPA likewise stated in other proposals that it would address the issues separately: (i) Existing provisions for minor source new source review programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs ("minor source NSR"); and (ii) existing provisions for PSD programs that may be inconsistent with current requirements of EPA's "Final NSR Improvement Rule," 67 FR 80,186 (December 31, 2002), as amended by 72 FR 32,526 (June 13, 2007) ("NSR Reform"). In light of the comments, EPA believes that its statements in various proposed actions on infrastructure SIPs with respect to these four individual issues should be explained in greater depth. It is important to emphasize that EPA is taking the same position with respect to these four substantive issues in this action on the infrastructure SIP

<sup>2</sup> See, Comments of Midwest Environmental Defense Center, dated May 31, 2011. Docket # EPA-R05-OAR-2007-1179 (adverse comments on proposals for three states in Region 5). EPA notes that these public comments on another proposal are not relevant to this rulemaking and do not have to be directly addressed in this rulemaking. EPA will respond to these comments in the appropriate rulemaking action to which they apply.

for the 1997 8-hour ozone NAAQS submittal from Washington.<sup>3</sup>

EPA intended the statements in the other proposals concerning these four issues merely to be informational, and to provide general notice of the potential existence of provisions within the existing SIPs of some states that might require future corrective action. EPA did not want states, regulated entities, or members of the public to be under the misconception that the Agency's approval of the infrastructure SIP submission of a given state should be interpreted as a reapproval of certain types of provisions that might exist buried in the larger existing SIP for such state. Thus, for example, EPA explicitly noted that the Agency believes that some states may have existing SIP approved SSM provisions that are contrary to the CAA and EPA policy, but that "in this rulemaking, EPA is not proposing to approve or disapprove any existing State provisions with regard to excess emissions during SSM of operations at facilities." EPA further explained, for informational purposes, that "EPA plans to address such State regulations in the future." EPA made similar statements, for similar reasons, with respect to the director's discretion, minor source NSR, and NSR Reform issues. EPA's objective was to make clear that approval of an infrastructure SIP for these ozone and PM<sub>2.5</sub> NAAQS should not be construed as explicit or implicit reapproval of any existing provisions that relate to these four substantive issues. EPA is reiterating that position in this action on the 1997 8-hour ozone infrastructure SIP for Washington.

Unfortunately, the commenters and others evidently interpreted these statements to mean that EPA considered action upon the SSM provisions and the other three substantive issues to be integral parts of acting on an infrastructure SIP submission, and therefore that EPA was merely postponing taking final action on the issues in the context of the infrastructure SIPs. This was not EPA's intention. To the contrary, EPA only meant to convey its awareness of the potential for certain types of deficiencies in existing SIPs, and to prevent any misunderstanding that it was reapproving any such existing provisions. EPA's intention was to convey its position that the statute does not require that infrastructure SIPs

<sup>3</sup> As noted earlier, EPA is proposing to disapprove Washington's SIP for those elements of CAA Section 110(a)(2) infrastructure requirements that require adequate PSD regulations as part of the approved SIP because the PSD program is implemented in Washington by means of a FIP.

address these specific substantive issues in existing SIPs and that these issues may be dealt with separately, outside the context of acting on the infrastructure SIP submission of a state. To be clear, EPA did not mean to imply that it was not taking a full final agency action on the infrastructure SIP submission with respect to any substantive issue that EPA considers to be a required part of acting on such submissions under section 110(k) or under section 110(c). Given the confusion evidently resulting from EPA's statements in those other proposals, however, we want to explain more fully the Agency's reasons for concluding that these four potential substantive issues in existing SIPs may be addressed separately from actions on infrastructure SIP submissions.

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

Although section 110(a)(1) addresses the timing and general requirements for these infrastructure SIPs, and section 110(a)(2) provides more details concerning the required contents of these infrastructure SIPs, EPA believes that many of the specific statutory provisions are facially ambiguous. In particular, the list of required elements provided in section 110(a)(2) contains a

wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive provisions, and some of which pertain to requirements for both authority and substantive provisions.<sup>4</sup> Some of the elements of section 110(a)(2) are relatively straightforward, but others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS.<sup>5</sup>

Notwithstanding that section 110(a)(2) provides that “each” SIP submission must meet the list of requirements therein, EPA has long noted that this literal reading of the statute is internally inconsistent, insofar as section 110(a)(2)(I) pertains to nonattainment SIP requirements that could not be met on the schedule provided for these SIP submissions in section 110(a)(1).<sup>6</sup> This illustrates that EPA must determine which provisions of section 110(a)(2) may be applicable for a given infrastructure SIP submission. Similarly, EPA has previously decided that it could take action on different parts of the larger, general “infrastructure SIP” for a given NAAQS without concurrent action on all subsections, such as section 110(a)(2)(D)(i), because the Agency bifurcated the action on these latter “interstate transport” provisions within section 110(a)(2) and worked with states to address each of the four prongs of section 110(a)(2)(D)(i) with substantive administrative actions proceeding on different tracks with different schedules.<sup>7</sup> This illustrates that EPA

may conclude that subdividing the applicable requirements of section 110(a)(2) into separate SIP actions may sometimes be appropriate for a given NAAQS where a specific substantive action is necessitated, beyond a mere submission addressing basic structural aspects of the state’s SIP. Finally, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS and the attendant infrastructure SIP submission for that NAAQS. For example, the monitoring requirements that might be necessary for purposes of section 110(a)(2)(B) for one NAAQS could be very different than what might be necessary for a different pollutant. Thus, the content of an infrastructure SIP submission to meet this element from a state might be very different for an entirely new NAAQS, versus a minor revision to an existing NAAQS.<sup>8</sup>

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

Given the potential for ambiguity of the statutory language of section 110(a)(1) and (2), EPA believes that it is appropriate for EPA to interpret that language in the context of acting on the infrastructure SIPs for a given NAAQS. Because of the inherent ambiguity of the list of requirements in section 110(a)(2),

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

<sup>8</sup> For example, implementation of the 1997 PM<sub>2.5</sub> NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

EPA has adopted an approach in which it reviews infrastructure SIPs against this list of elements “as applicable.” In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the purpose of the submission or the NAAQS in question, would meet each of the requirements, or meet each of them in the same way. EPA elected to use guidance to make recommendations for infrastructure SIPs for these ozone and PM<sub>2.5</sub> NAAQS.

On October 2, 2007, EPA issued guidance making recommendations for the infrastructure SIP submissions for both the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS.<sup>9</sup> Within this guidance document, EPA described the duty of states to make these submissions to meet what the Agency characterized as the “infrastructure” elements for SIPs, which it further described as the “basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards.”<sup>10</sup> As further identification of these basic structural SIP requirements, “attachment A” to the guidance document included a short description of the various elements of section 110(a)(2) and additional information about the types of issues that EPA considered germane in the context of such infrastructure SIPs. EPA emphasized that the description of the basic requirements listed on attachment A was not intended “to constitute an interpretation of” the requirements, and was merely a “brief description of the required elements.”<sup>11</sup> EPA also stated its belief that with one exception, these requirements were “relatively self explanatory, and past experience with SIPs for other NAAQS should enable States to meet these requirements with assistance from EPA Regions.”<sup>12</sup> For the one exception to that general assumption, however, *i.e.*, how states should proceed with respect to the requirements of section 110(a)(2)(G) for the 1997 PM<sub>2.5</sub> NAAQS, EPA gave much more specific recommendations. But for

<sup>9</sup> See, “Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards,” from William T. Harnett, Director Air Quality Policy Division, to Air Division Directors, Regions I–X, dated October 2, 2007.

<sup>10</sup> *Id.*, at page 2.

<sup>11</sup> *Id.*, at attachment A, page 1.

<sup>12</sup> *Id.*, at page 4. In retrospect, the concerns raised by commenters with respect to EPA’s approach to some substantive issues indicates that the statute is not so “self explanatory,” and indeed is sufficiently ambiguous that EPA needs to interpret it in order to explain why these substantive issues do not need to be addressed in the context of infrastructure SIPs and may be addressed at other times and by other means.

<sup>4</sup> For example, section 110(a)(2)(E) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a substantive program to address certain sources as required by part C of the CAA; section 110(a)(2)(G) provides that states must have both legal authority to address emergencies and substantive contingency plans in the event of such an emergency.

<sup>5</sup> For example, section 110(a)(2)(D)(i) requires EPA to be sure that each state’s SIP contains adequate provisions to prevent significant contribution to nonattainment of the NAAQS in other states. This provision contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution. See, *e.g.*, “Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call; Final Rule,” 70 FR 25,162 (May 12, 2005) (defining, among other things, the phrase “contribute significantly to nonattainment”).

<sup>6</sup> See, *e.g.*, *Id.*, 70 FR 25,162, at 63–65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

<sup>7</sup> EPA issued separate guidance to states with respect to SIP submissions to meet section

other infrastructure SIP submittals, and for certain elements of the submittals for the 1997 PM<sub>2.5</sub> NAAQS, EPA assumed that each State would work with its corresponding EPA regional office to refine the scope of a State's submittal based on an assessment of how the requirements of section 110(a)(2) should reasonably apply to the basic structure of the State's SIP for the NAAQS in question.

On September 25, 2009, EPA issued guidance to make recommendations to states with respect to the infrastructure SIPs for the 2006 PM<sub>2.5</sub> NAAQS.<sup>13</sup> In the 2009 Guidance, EPA addressed a number of additional issues that were not germane to the infrastructure SIPs for the 1997 8-hour ozone and 1997 PM<sub>2.5</sub> NAAQS, but were germane to these SIP submittals for the 2006 PM<sub>2.5</sub> NAAQS, e.g., the requirements of section 110(a)(2)(D)(i) that EPA had bifurcated from the other infrastructure elements for those specific 1997 ozone and PM<sub>2.5</sub> NAAQS. Significantly, neither the 2007 Guidance nor the 2009 Guidance explicitly referred to the SSM, director's discretion, minor source NSR, or NSR Reform issues as among specific substantive issues EPA expected states to address in the context of the infrastructure SIPs, nor did EPA give any more specific recommendations with respect to how states might address such issues even if they elected to do so. The SSM and director's discretion issues implicate section 110(a)(2)(A), and the minor source NSR and NSR Reform issues implicate section 110(a)(2)(C). In the 2007 Guidance and the 2009 Guidance, however, EPA did not indicate to states that it intended to interpret these provisions as requiring a substantive submission to address these specific issues in existing SIP provisions in the context of the infrastructure SIPs for these NAAQS. Instead, EPA's 2007 Guidance merely indicated its belief that the states should make submissions in which they established that they have the basic SIP structure necessary to implement, maintain, and enforce the NAAQS. EPA believes that states can establish that they have the basic SIP structure, notwithstanding that there may be potential deficiencies within the existing SIP. Thus, EPA's proposals for other states mentioned these issues not because the Agency considers them issues that must be addressed in the context of an infrastructure SIP as

required by section 110(a)(1) and (2), but rather because EPA wanted to be clear that it considers these potential existing SIP problems as separate from the pending infrastructure SIP actions. The same holds true for this action on the 1997 8-hour ozone infrastructure SIP for Washington.

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

Finally, EPA believes that its approach is a reasonable reading of section 110(a)(1) and (2) because the statute provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow the Agency to take appropriate tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a "SIP call" whenever the Agency determines that a state's SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or otherwise to comply with the CAA.<sup>14</sup> Section

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

#### V. What is EPA's analysis of Washington's submittal?

The Washington SIP submittal lists specific provisions of the Revised Code of Washington (RCW) including Chapter 70.94 RCW Washington Clean Air Act; Chapter 43.21 RCW Department of Ecology; Chapter 34.05 RCW Administrative Procedure Act; Chapter 42.30 RCW Open Public Meetings Act; Chapter 42.17 RCW Public Disclosure Act; and the Washington Administrative Code (WAC) Chapters 173–400 through –492 as codified in the SIP at 40 CFR part 52 Subpart WW.

#### 110(a)(2)(A): Emission Limits and Other Control Measures

Section 110(a)(2) requires SIPs to include enforceable emission limits and other control measures, means or techniques, schedules for compliance and other related matters. EPA notes that the specific nonattainment area plan requirements of Section 110(a)(2)(I) are subject to the timing requirement of

<sup>15</sup> EPA has recently utilized this authority to correct errors in past actions on SIP submissions related to PSD programs. See, "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule," 75 FR 82,536 (Dec. 30, 2010). EPA has previously used its authority under CAA 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. See, e.g., 61 FR 38,664 (July 25, 1996) and 62 FR 34,641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67,062 (November 16, 2004) (corrections to California SIP); and 74 FR 57,051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

<sup>16</sup> EPA has recently disapproved a SIP submission from Colorado on the grounds that it would have included a director's discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, e.g., 75 FR 42,342 at 42,344 (July 21, 2010)(proposed disapproval of director's discretion provisions); 76 FR 4,540 (Jan. 26, 2011)(final disapproval of such provisions).

<sup>13</sup> See, "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle (PM<sub>2.5</sub>) National Ambient Air Quality Standards (NAAQS)," from William T. Harnett, Director Air Quality Policy Division, to Regional Air Division Directors, Regions I–X, dated September 25, 2009 (the "2009 Guidance").

<sup>14</sup> EPA has recently issued a SIP call to rectify a specific SIP deficiency related to the SSM issue. See, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21,639 (April 18, 2011).

Section 172, not the timing requirement of Section 110(a)(1).

*Washington's submittal:* The Washington SIP submittal lists the emissions limitation regulations of WAC Chapters 173–400 through -492 as codified in 40 CFR 52.2470. These regulations are (in parenthesis: state adopted date; EPA approval date; and FR citation):

- WAC 173–400 General Regulations for Air Pollution Sources (3/22/91; 6/2/95; 60 FR 28726)
- WAC 173–405 Kraft Pulping Mills (3/22/91; 1/15/93; 58 FR 4578)
- WAC 173–410 Sulfite Pulping Mills (3/22/91; 1/15/93; 58 FR 4578)
- WAC 173–415 Primary Aluminum Plants (3/22/91; 1/15/93; 58 FR 4578)
- WAC 173–425 Open Burning (10/18/90; 1/15/93; 58 FR 4578)
- WAC 173–433 Solid Fuel Burning Device Standards (various dates from 12/16/87 to 10/18/90; 1/15/93; 58 FR 4578)
- WAC 173–434 Solid Waste Incinerator Facilities (various dates from 12/16/87 to 1/22/04; 1/15/93; 58 FR 4578)
- WAC 173–490 Emission Standards and Controls for Sources Emitting Volatile Organic Compounds (3/22/91; 9/10/93; 58 FR 37426)

As part of the federally approved SIP codified in 40 CFR Part 52 Subpart WW, Washington State has an air quality permitting program for minor sources. As discussed previously, major sources are subject to regulation under the PSD permitting program implemented by means of a FIP which incorporates the PSD program specified at 40 CFR 52.21 (See 40 CFR 52.2497).

Under the Washington Clean Air Act general authority to adopt enforceable emission standards and limitations and other measures necessary for the attainment and maintenance of NAAQS is contained in RCW 70.94.331, Powers and Duties of Department. The following sections of the statute address various components of the state's emissions control measures and permitting program:

- RCW 70.94.152 Notice May be Required of Construction of Proposed New Contaminant Source—Submission of Plans—Approval, Disapproval—Emission Control—“De Minimis New Sources” Defined
- RCW 70.94.153 Existing Stationary Source—Replacement or Substantial Alteration of Emission Control Technology
- RCW 70.94.161 Operating Permits for Air Contaminant Sources—Generally—Fees, Report to Legislature
- RCW 70.94.162 Annual Fees from Operating Permit Program

- RCW 70.94.380 Emission Control Requirements

- RCW 70.94.395 Air Contaminant Sources—Regulation by Department; Authorities May be More Stringent—Hearing—Standards

- RCW 70.94.430 Penalties
- RCW 70.94.431 Civil Penalties—Excusable Excess Emissions

- RCW 70.94.850 Emission Credits Banking Program—Amount of Credit

*EPA analysis:* EPA finds that Washington's rules as codified in 40 CFR 52.2470, Subpart WW define and reference emissions limits and significant emissions rates for air pollutants including NO<sub>x</sub> and VOCs, which are precursors to ozone. Washington has no areas designated nonattainment for the 1997 8-hour ozone NAAQS.

Some of the rules listed above were approved into the SIP under part D because certain areas in Washington were historically nonattainment under the 1-hour ozone standard and required maintenance plans to ensure on-going compliance with the 1997 8-hour ozone standard. As a result, Washington regulates ozone and its precursors through its SIP-approved minor source permitting program and ozone maintenance plans. EPA does not consider SIP requirements triggered by the nonattainment area mandates in part D of Title I of the CAA to be governed by the submission deadline of section 110(a)(1), and EPA is not proposing to find the SIP to be adequate for purposes of CAA Part D requirements in this action. Nevertheless, Washington has referenced some SIP provisions originally submitted in response to part D in its submittal documenting its compliance with the infrastructure requirements of section 110(a)(1) and (2). Washington has over time updated the elements of its SIP addressing the ozone NAAQS, and the provisions reviewed here are a weave of SIP revisions submitted in response to the infrastructure requirements of section 110(a)(2) and the nonattainment requirements of part D.

For the purposes of this action, EPA is reviewing any rules originally submitted in response to part D solely for the purposes of determining whether they support a finding that the state has met the basic infrastructure requirements under section 110(a)(2). EPA is proposing to approve Washington's SIP as meeting the requirements of section 110(a)(2)(A) for the 1997 8-hour ozone NAAQS.

In this action, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during startup, shutdown, or

malfunction (SSM) of operations at a facility. EPA believes that a number of states may have SSM provisions that are contrary to the Clean Air Act and existing EPA guidance<sup>17</sup> and the Agency plans to address such state regulations in the future. In the meantime, EPA encourages any state having a deficient SSM provision to take steps to correct it as soon as possible.

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

#### *110(a)(2)(B): Ambient Air Quality Monitoring/Data System*

Section 110(a)(2)(B) requires SIPs to include provisions to provide for establishment and operation of ambient air quality monitors, collecting and analyzing ambient air quality data, and making these data available to EPA upon request.

*Washington's submittal:* Washington references RCW 70.94.331(5) which requires Ecology to provide for or conduct surveillance program that: monitors the quality of the ambient atmosphere, monitors the concentrations and movements of air contaminants, and determines the quantity of emissions to the atmosphere. The regulations implementing this provision are contained in WAC 173–400–105 Records, Monitoring and Reporting as codified in the SIP at 40 CFR 52.2470, Subpart WW.

*EPA analysis:* In accordance with EPA's air quality monitoring requirements of 40 CFR part 58 states are required to submit annual network reviews to determine if the network achieved its required air monitoring objectives and if it should be modified (e.g., termination, relocation or establishment of monitoring stations) to meet those objectives. Washington's most recent annual network review was

<sup>17</sup> Steven Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation. “State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown.” Memorandum to EPA Air Division Directors, August 11, 1999.

approved by EPA on December 7, 2011, and is available to the public on the Ecology Web site at <http://www.ecy.wa.gov/biblio/1102017.html>. This plan includes, among other things, the locations for the ozone monitoring network. In addition, Washington sends real time air monitoring information for ozone, particulate matter, and carbon monoxide to EPA's AIRNow Web page at <http://www.airnow.gov> and also provides the information on the Ecology Web site at <https://fortress.wa.gov/ecy/enviwa/Default.ltr.aspx>. Based on the foregoing, EPA proposes to approve the Washington's SIP as meeting the requirements of CAA Section 110(a)(2)(B) for the 1997 8-hour ozone NAAQS.

#### *110(a)(2)(C): Program for Enforcement of Control Measures*

Section 110(a)(2)(C) requires states to include a program providing for enforcement of all SIP measures and the regulation of construction of new or modified stationary sources, including a program to meet PSD and nonattainment NSR requirements.

*Washington's submittal:* Washington State cites the following regulatory provisions contained in the SIP which provide for the enforcement of the measures described in subparagraph (A). As discussed previously, Washington State has an EPA-approved air quality permitting program for minor sources. For major sources, EPA has a FIP in place to implement the PSD program.

- WAC 173–400–230 Regulatory Actions (state adopted date 3/20/93; EPA approval date 6/2/95; 60 FR 28726)
- WAC 173–400–240 Criminal Penalties (state adopted date 3/22/91; EPA approval date 6/2/95; 60 FR 28726)

Ecology's enforcement powers are derived from the statutory provisions in Chapter 70.94 RCW:

- RCW 70.94.141 Air Pollution Control Authority—Powers and Duties of Activated Authority
  - RCW 70.94.200 Investigation of Conditions by Control Officer or Department—Entering Private, Public Property
  - RCW 70.94.211 Enforcement Actions by Air Authority—Notice to Violators
  - RCW 70.94.332 Enforcement Actions by Department—Notice to Violators
  - RCW 70.94.425 Restraining Orders—Injunctions
  - RCW 70.94.430 Penalties
  - RCW 70.94.431 Civil Penalties—Excusable Excess Emissions
  - RCW 70.94.435 Additional Means for Enforcement of Chapter

*EPA analysis:* To generally meet the requirements of section 110(a)(2)(C), the state is required to have a minor NSR permitting program adequate to implement the 1997 8-hour ozone NAAQS. For major sources a FIP is in place to implement the PSD program. Because the SIP does not contain approved PSD permitting provisions, EPA is proposing to disapprove that aspect of the SIP. However, as explained previously, EPA need not take any additional action related to the section 110(a)(2) provisions that are contingent upon adequate PSD permitting provisions in the SIP because these requirements are currently addressed by a FIP. Also, as discussed above, in this action EPA is not evaluating nonattainment related provisions, such as the nonattainment NSR program required by part D of the CAA, nor does Washington have nonattainment areas for the 1997 8-hour ozone NAAQS.

EPA believes Washington code provides Ecology with the authority to enforce the air quality laws, regulations, permits, and orders promulgated pursuant to WAC Chapters 173–400 through –492 as codified in the SIP at 40 CFR 52.2470, Subpart WW. Ecology staffs and maintains an enforcement program to ensure compliance with SIP requirements. The Ecology director may issue a restraining order for polluting activities that constitute or will constitute a violation under the SIP approved provisions of WAC 173–400–230(4). Enforcement cases may be referred to the state Attorney General's Office for civil or criminal enforcement. Therefore, EPA is proposing to approve the Washington SIP as meeting the requirements of 110(a)(2)(C) related to enforcement for the 1997 8-hour ozone NAAQS.

In this action, EPA is not proposing to approve or disapprove the state's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program, such as the SSM and director's discretion provisions discussed with respect to 110(a)(2)(A). EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that

meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

#### *110(a)(2)(D): Interstate Transport*

Section 110(a)(2)(D) requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment, or interfering with maintenance of the NAAQS in another state, or from interfering with measures required to prevent significant deterioration of air quality or to protect visibility in another state. As noted above, this action does not address the requirements of 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS which were previously approved by EPA on January 13, 2009 (74 FR 1501).

#### *Interstate and International Transport Provisions*

Section 110(a)(2)(D)(ii) requires SIPs to include provisions ensuring compliance with the applicable requirements of sections 126 and 115 (relating to interstate and international pollution abatement). Specifically, section 126(a) requires new or modified major sources to notify neighboring states of potential impacts from the source.

*EPA analysis:* The notification requirements of CAA section 126(a) pertain only to major proposed new or modified sources. As previously discussed, the major source PSD program in Washington is implemented under a FIP and is therefore not part of this action. The state has no pending obligations under section 115 or 126(b) of the Act. Because the PSD permitting program is implemented pursuant to a FIP, EPA is proposing to disapprove the Washington SIP because it does not meet the requirements of CAA section 110(a)(2)(D)(ii) for the 1997 8-hour ozone NAAQS. However, these requirements are adequately satisfied by the FIP and thus no additional action by Washington or EPA is needed to satisfy this infrastructure requirement for the 1997 8-hour ozone NAAQS.

#### *110(a)(2)(E): Adequate Resources*

Section 110(a)(2)(E) requires states to provide (i) necessary assurances that the state will have adequate personnel, funding, and authority under state law to carry out the SIP (and is not prohibited by any provision of Federal or state law from carrying out the SIP or portion thereof), (ii) requires that the state comply with the requirements respecting state boards under section

128 and (iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumental government, or instrumentality for the implementation of any SIP provision, the state has responsibility for ensuring adequate implementation of such SIP provision.

*Washington's submittal:* Ecology cites the following:

Chapter 43.21A RCW provides authority for the director to employ personnel necessary for administration of this chapter. Chapters 43.21A and 70.94 RCW provide for Ecology's rule-making authority. Ecology's Air Quality Program is funded through the following funding sources: the state General Fund, section 105 of the CAA grant program, Air Operating Permit Account (permit fees from large industrial sources), and Air Pollution Control Account (permit fees for burning and annual fees for small industrial air pollution sources).

The SIP-approved provisions of WACs 173-400-220 Requirements for Board Members and 173-400-260 Conflict of Interest (state adopted date 3/22/91; EPA approval date 6/2/95; 60 FR 28726) provide that no state board or body which approves operating permits or enforcement orders, either in the first instance or upon appeal, shall be constituted of less than a majority of members who represent the public interest and who do not derive a significant portion of their income from persons subject to operating permits. State law also provides that any potential conflicts of interest by members of such board or body or the head of any executive agency with similar powers be adequately disclosed. See RCW 34.05.425 Administrative Procedure Act; RCW 42.17 Public Disclosure Act; RCW 70.94.100 Composition of Local Air Authorities' Board; Conflict of Interest Requirements.

Ecology works with other organizations and agencies and may enter into agreements allowing for implementation of the air pollution controls by another agency. However, RCW 70.94.370 states that no provision of this chapter or any recommendation of the state board or of any local or regional air pollution program is a limitation on the power of a state agency in the enforcement, or administration of any provision of law which it is specifically permitted or required to enforce or administer.

*EPA analysis:* Regarding adequate personnel, funding and authority, EPA believes the Washington SIP meets the requirements of this element. Washington receives sections 103 and 105 grant funds from EPA and provides

state matching funds necessary to carry out SIP requirements. Regarding the state board requirements under section 128, EPA approved WAC 173-400-220 Requirements for Board Members and WAC 173-400-260 Conflict of Interest as meeting the section 128 requirements on June 2, 1995 (60 FR 28726). Finally, regarding state responsibility and oversight of local and regional entities, RCW 70.94.370 provides Ecology with adequate authority to carry out SIP obligations with respect to the 1997 8-hour ozone NAAQS. Therefore EPA is proposing to approve the Washington SIP as meeting the requirements of CAA Section 110(a)(2)(E) for the 1997 8-hour ozone NAAQS.

#### *110(a)(2)(F): Stationary Source Monitoring System*

Section 110(a)(2)(F) requires (i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to the CAA, which reports shall be available at reasonable times for public inspection.

*Washington's submittal:* Washington's SIP submittal refers to the following SIP approved regulatory provisions:

- WAC 173-400-105 Records, Monitoring, and Reporting (state adopted date 9/20/93; EPA approval date 6/2/95; 60 FR 28726)
- WAC 173-400-110 New Source Review (NSR) (state adopted date 3/22/91; EPA approval date 6/2/95; 60 FR 28726)
- WAC 173-400-112 Requirements for New Sources in Nonattainment Areas (state adopted date 3/22/91; EPA approval date 6/2/95; 60 FR 28726)
- WAC 173-400-113 Requirements for New Sources in Attainment or Unclassifiable Areas (state adopted date 3/22/91; EPA approval date 6/2/95; 60 FR 28726)

*EPA analysis:* The provisions cited by the Washington SIP submittal provide for monitoring, recordkeeping and reporting requirements for sources. As noted previously, Washington State has an EPA-approved air quality permitting program for minor sources. A FIP implements the PSD program requirements for major sources. EPA proposes to approve the Washington SIP as meeting the requirements of CAA Section 110(a)(2)(F) for the 1997 8-hour ozone NAAQS, with the exception of

those aspects of the infrastructure requirements which relate to PSD permitting. EPA proposes disapprove that aspect of the SIP because the PSD provisions continue to be implemented by a FIP. Accordingly, no additional action is needed by Washington or EPA in response to this proposed disapproval.

#### *110(a)(2)(G): Emergency Episodes*

Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health, including contingency plans to implement the emergency episode provisions in their SIPs.

*Washington's submittal:* The Washington submittal cites the emergency episode regulations of WAC 173-435 approved into the SIP by EPA on January 15, 1993 (58 FR 4578). The significant harm level for ozone under the SIP approved WAC 173-435 is identical to the level contained in the current Federal regulations at 40 CFR 51.151.

*EPA analysis:* As noted in EPA's October 2, 2007 guidance, the significant harm level for the 8-hour ozone NAAQS shall remain unchanged at 0.60 ppm ozone, 2 hour average, as indicated in 40 CFR 51.151. EPA believes that the existing ozone-related provisions of 40 CFR 51 Subpart H remain appropriate. Washington's regulations discussed above, which have previously been approved by EPA into the SIP on January 15, 1993 (58 FR 4578) continue to be consistent with the requirements of 40 CFR 51.151. Accordingly, EPA proposes to find that the Washington SIP is adequate for purposes of CAA section 110(a)(2)(G) for the 1997 8-hour ozone NAAQS.

#### *110(a)(2)(H): Future SIP Revisions*

Section 110(a)(2)(H) requires that SIPs provide for revision of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii), except as provided in paragraph 110(a)(3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the SIP is substantially inadequate to attain the NAAQS which it implements or to otherwise comply with any additional requirements under the CAA.

*Washington's submittal:* Washington's SIP submittal refers to RCW 70.94 which gives Ecology the authority to promulgate rules and regulations to

maintain and protect Washington's air quality and to comply with the federal requirements, including revisions of NAAQS, SIPs, and responding to EPA's findings.

*EPA analysis:* RCW 70.94.510 specifically requires Ecology to cooperate with the federal government in order to insure the coordination of the provisions of the federal and state clean air acts. EPA proposes to approve the Washington SIP as meeting the requirements of section 110(a)(2)(H) for the 1997 8-hour ozone NAAQS.

*110(a)(2)(I): Nonattainment Area Plan Revision Under Part D*

*EPA analysis:* There are two elements identified in section 110(a)(2) not governed by the 3 year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within 3 years after promulgation of a new or revised NAAQS, but rather due at the time of the nonattainment area plan requirements pursuant to section 172. These requirements are: (i) Submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA, and (ii) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. As a result, this action does not address infrastructure elements related to section 110(a)(2)(C) with respect to nonattainment NSR or section 110(a)(2)(I).

*110(a)(2)(J): Consultation With Government Officials*

Section 110(a)(2)(J) requires states to provide a process for consultation with local governments and Federal Land Managers carrying out NAAQS implementation requirements pursuant to Section 121 relating to consultation. Section 110(a)(2)(J) further requires states to notify the public if NAAQS are exceeded in an area and to enhance public awareness of measures that can be taken to prevent exceedances. Lastly, section 110(a)(2)(J) requires states to meet applicable requirements of part C related to prevention of significant deterioration and visibility protection.

*Washington's submittal:* Washington's SIP submittal refers to a number of laws and regulations relating to consultation and public notification:

- WAC 173-400-171 Public Involvement (state effective date 9/20/93; EPA approval date 6/2/95; 60 FR 28726).
- WAC 173-435-050 Emergency Episode Plan (state effective date 1/3/89;

EPA approval date 1/15/93; 58 FR 4578).

- RCW 70.94.141 Washington Clean Air Act, Air Pollution Control Authority—Powers and Duties of Activated Authority.
- RCW 70.94.240 Washington Clean Air Act, Air Pollution Control Advisory Council.
- RCW 34.05 Administrative Procedure Act.
- RCW 42.30 Open Public Meetings Act.

*EPA analysis:* Under the SIP approved provisions of WAC 173-400-171 Public Involvement, Ecology routinely coordinates with local governments, states, federal land managers, and other stakeholders on air quality issues and provides notice to appropriate agencies related to permitting actions. Washington regularly participates in regional planning processes including the Western Regional Air Partnership which is a voluntary partnership of states, tribes, federal land managers, local air agencies, and the U.S. EPA whose purpose is to understand current and evolving regional air quality issues in the West. Therefore EPA proposes to approve the Washington SIP as meeting the requirements of CAA Section 110(a)(2)(J) for consultation with government officials.

Washington sends real time air monitoring information for ozone, particulate matter, and carbon monoxide to EPA's AIRNow Web page at <http://www.airnow.gov> and also provides the information on Ecology's Web site at <https://fortress.wa.gov/ecy/enviwa/Default.ltr.aspx>. Therefore, EPA is proposing to approve the Washington SIP as meeting the requirements of CAA Section 110(a)(2)(J) for public notification.

Turning to the requirement in section 110(a)(2)(J) that the SIP meet the applicable requirements of part C of title I of the CAA, EPA has evaluated this requirement with respect to PSD permitting. As previously discussed, the major source PSD permitting program in Washington is implemented by means of a FIP. Therefore, EPA proposes to find that Washington's SIP must be disapproved with respect to the requirements of 110(a)(2)(J) because PSD provisions are not part of Washington's SIP. However, because the PSD provisions are adequately addressed by the FIP that is in place, no further action is needed by Washington or EPA in response to this proposed disapproval.

With regard to the applicable requirements for visibility protection, EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the CAA.

In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus we find that there is no new visibility obligation triggered under section 110(a)(2)(J) when a new NAAQS becomes effective.

*110(a)(2)(K): Air Quality and Modeling/ Data*

Section 110(a)(2)(K) requires that SIPs provide for (i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and (ii) the submission, upon request, of data related to such air quality modeling to the Administrator.

*Washington's submittal:* Washington's SIP submittal refers to the SIP-approved minor source NSR permitting provisions in WAC 173-400-110, -112, and -113 (State adopted date 3/22/91; EPA approval date 6/2/95; 60 FR 28726), which models pollutant concentrations in the ambient air based on EPA's guidance and latest methodologies and techniques specified in 40 CFR 51, Appendix W (Guideline on Air Quality Models). Ecology also cites the Washington Clean Air Act (specifically RCW 70.94.011 Declaration of Public Policies and Purpose and RCW 70.94.510 Policy to Cooperate with Federal Government) which directs Ecology to cooperate with the federal government in order to coordinate and implement federal and state clean air acts, which would include the submission of data related to air quality modeling to the Administrator.

*EPA analysis:* Washington models estimates of ambient concentrations based on 40 CFR part 51 Appendix W (Guidelines on Air Quality Models). Any change or substitution from models specified in 40 CFR part 51, Appendix W is subject to notice and opportunity for public comment. While Washington has no nonattainment areas for the 1997 8-hour ozone NAAQS, modeling was used to support maintenance plans and redesignation to attainment requests for the historical nonattainment areas of Puget Sound and Vancouver approved by EPA on September 26, 1996 (61 FR 50438) and May 19, 1997 (62 FR 27204), respectively. Modeling data has been provided to EPA in this context. Based on the foregoing, EPA proposes to approve Washington's SIP as meeting the requirements of CAA Section 110(a)(2)(K) for the 1997 8-hour ozone NAAQS.

*110(a)(2)(L): Permitting Fees*

Section 110(a)(2)(L) requires SIPs to require each major stationary source to pay permitting fees to cover the cost of reviewing, approving, implementing, and enforcing a permit, until such time as the SIP fee requirement is superseded by EPA's approval of the state's Title V operating permit program.

*Washington's submittal:* Washington's SIP submittal refers to RCW 70.94.162, Annual Fees from Operating Permit Program Source to Cover Cost of Program, which provides Ecology authority to establish a schedule of fees for permits based upon the costs of filing and investigating applications, issuing or denying permits, carrying out Title V requirements, and determining compliance. Washington's submittal also refers to WAC 173-455, Air Quality Fee Regulation, which requires payment of permit fees based on a specified table of sources and fee schedule.

*EPA analysis:* On August 13, 2001 (66 FR 42439), EPA fully approved Washington's Title V program. As part of the approval process, Washington's Title V program included a demonstration the state will collect a fee from Title V sources above the presumptive minimum in accordance with 40 CFR 70.9(b)(2)(i). Therefore, EPA proposes to find that Washington has satisfied the requirements of CAA Section 110(a)(2)(L) for the 1997 8-hour ozone NAAQS.

*110(a)(2)(M): Consultation/Participation by Affected Local Entities*

Section 110(a)(2)(M) requires states to provide for consultation and participation in SIP development by local political subdivisions affected by the SIP.

*Washington's submittal:* Washington's SIP submittal refers to the following laws and regulations:

- WAC 173-400-171 Public Involvement (state effective date 9/20/93; EPA approval date 6/2/95; 60 FR 28726).

- RCW 34.05 Administrative Procedure Act.

- RCW 42.30 Open Public Meetings Act.

- RCW 70.94.240 Washington Clean Air Act, Air Pollution Control Advisory Council.

*EPA analysis:* As discussed in the narrative relating to 110(a)(2)(J), Ecology routinely coordinates with local governments and other stakeholders on air quality issues. The public involvement regulations cited in Washington's submittal were previously approved into Washington's federally-approved SIP on June 2, 1995 (60 FR

28726). Therefore, EPA proposes to find that Washington's SIP meets the requirements of CAA Section 110(a)(2)(M) for the 1997 8-hour ozone NAAQS.

**VI. Scope of Proposed Action**

This proposed SIP approval does not extend to sources or activities located in "Indian Country" as defined in 18 U.S.C. 1151.<sup>18</sup> Consistent with previous Federal program approvals or delegations, EPA will continue to implement the Act in Indian Country because Washington did not adequately demonstrate authority over sources and activities located within the exterior boundaries of Indian reservations and other areas of Indian Country. The one exception is within the exterior boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773, Congress explicitly provided state and local agencies in Washington authority over activities on non-trust lands within the 1873 Survey Area. Therefore, EPA's proposed SIP approval applies to sources and activities on nontrust lands within the 1873 Survey Area.

**VII. Proposed Action**

EPA is proposing to approve the following section 110(a)(2) infrastructure elements for Washington for the 1997 ozone NAAQS: (A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), (M), except for those portions of (C), (D)(ii), and (J) which relate to PSD and are addressed by the FIP codified at 40 CFR 52.2497. Therefore, EPA proposes to disapprove the SIP as inadequate for these PSD-related requirements, but no additional action is required by the state or EPA pursuant to this proposed disapproval because the requirements are adequately addressed by the FIP. EPA is also taking no action on infrastructure elements (D)(i) and (I) for the 1997 ozone NAAQS. This action is being taken under section 110 of the CAA.

<sup>18</sup> "Indian country" is defined under 18 U.S.C. 1151 as: (1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Under this definition, EPA treats as reservations trust lands validly set aside for the use of a Tribe even if the trust lands have not been formally designated as a reservation.

**VIII. Washington Notice Provision**

Washington's Regulatory Reform Act of 1995, codified at Chapter 43.05 Revised Code of Washington (RCW), precludes "regulatory agencies", as defined in RCW 43.05.010, from assessing civil penalties under certain circumstances. EPA has determined that Chapter 43.05 of the RCW, often referred to as "House Bill 1010," conflicts with the requirements of CAA section 110(a)(2)(A) and (C) and 40 CFR 51.230(b) and (e). Based on this determination, Ecology has determined that Chapter 43.05 RCW does not apply to the requirements of Chapter 173-422 WAC. See 66 FR 35115, 35120 (July 3, 2001). The restriction on the issuance of civil penalties in Chapter 43.05 RCW does not apply to local air pollution control authorities in Washington because local air pollution control authorities are not "regulatory agencies" within the meaning of that statute. See 66 FR 35115, 35120 (July 3, 2001).

In addition, EPA is relying on the State's interpretation of another technical assistance law, RCW 43.21A.085 and .087, to conclude that the law does not impinge on the State's authority to administer Federal Clean Air Act programs. The Washington Attorney Generals' Office has concluded that RCW 43.21A.085 and .087 do not conflict with Federal authorization requirements because these provisions implement a discretionary program. EPA understands from the State's interpretation that technical assistance visits conducted by the State will not be conducted under the authority of RCW 43.21A.085 and .087. See 66 FR 16, 20 (January 2, 2001); 59 FR 42552, 42555 (August 18, 1994).

**IX. Statutory and Executive Order Reviews**

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in Washington<sup>19</sup> 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, and Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

<sup>19</sup>The one exception is within the exterior boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773, Congress explicitly provided State and local agencies in Washington authority over activities on non-trust lands within the 1873 Survey Area.

Dated: February 23, 2012.

**Dennis J. McLearnan,**

*Regional Administrator, Region 10.*

[FR Doc. 2012-5393 Filed 3-5-12; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 271

[EPA-R06-RCRA-2011-0478; FRL-9642-5]

#### Texas: Final Authorization of State Hazardous Waste Management Program Revisions

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

**ACTION:** Proposed rule.

**SUMMARY:** The State of Texas has applied to EPA for Final authorization of the changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA proposes to grant Final authorization to the State of Texas. In the “Rules and Regulations” section of this **Federal Register**, EPA is authorizing the changes by an immediate final rule. EPA did not make a proposal prior to the immediate final rule because we believe this action is not controversial and do not expect comments that oppose it. We have explained the reasons for this authorization in the preamble to the immediate final rule. Unless we get written comments which oppose this authorization during the comment period, the immediate final rule will become effective on the date it establishes, and we will not take further action on this proposal. If we receive comments that oppose this action, we will withdraw the immediate final rule and it will not take effect. We will then respond to public comments in a later final rule based on this proposal. You may not have another opportunity for comment. If you want to comment on this action, you must do so at this time.

**DATES:** Send your written comments by April 5, 2012.

**ADDRESSES:** Send written comments to Alima Patterson, Region 6, Regional Authorization Coordinator, (6PD-O), Multimedia Planning and Permitting Division, at the address shown below. You can examine copies of the materials submitted by the State of Texas during normal business hours at the following locations: EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, phone number (214) 665-8533; or Texas Commission on Environmental Quality, (TCEQ) 12100 Park S. Circle, Austin TX

78753-3087, (512) 239-6079. Comments may also be submitted electronically or through hand delivery/courier; please follow the detailed instructions in the **ADDRESSES** section of the immediate final rule which is located in the Rules section of this **Federal Register**.

#### FOR FURTHER INFORMATION CONTACT:

Alima Patterson (214) 665-8533.

**SUPPLEMENTARY INFORMATION:** For additional information, please see the immediate final rule published in the “Rules and Regulations” section of this **Federal Register**.

Dated: February 17, 2012

**Al Armendariz,**

*Regional Administrator, Region 6.*

[FR Doc. 2012-5378 Filed 3-5-12; 8:45 am]

**BILLING CODE 6560-50-P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[FWS-R1-ES-2011-N251;  
FXES1113010000C4-123-FF01E00000]

#### Endangered and Threatened Wildlife and Plants; 5-Year Status Reviews of 46 Species in Idaho, Oregon, Washington, Nevada, Montana, Hawaii, Guam, and the Northern Mariana Islands

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of initiation of reviews; request for information.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, are initiating 5-year reviews for 46 species in Idaho, Oregon, Washington, Nevada, Montana, Hawaii, Guam, and the Northern Mariana Islands under the Endangered Species Act of 1973, as amended (Act). We request any new information on these species that may have a bearing on their classification as endangered or threatened. Based on the results of our 5-year reviews we will determine whether these species are properly classified under the Act.

**DATES:** To ensure consideration in our reviews, we are requesting submission of new information no later than May 7, 2012. However, we will continue to accept new information about any listed species at any time.

**ADDRESSES:** For the 44 species in Hawaii, Guam, and the Northern Mariana Islands (see Table 1 below), submit information to: Field Supervisor, Attention: 5-Year Review, U.S. Fish and Wildlife Service, Pacific Islands Fish