ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2010–0107; FRL–9236–3]

RIN–2060–AQ08

Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is issuing a finding that the EPA-approved state implementation plans (SIP) of 13 states (comprising 15 state and local programs) are substantially inadequate to meet Clean Air Act (CAA) requirements because they do not apply Prevention of Significant Deterioration (PSD) requirements to greenhouse gas (GHG)-emitting sources. In addition, EPA is issuing a "SIP call" for each of these states, which requires the state to revise its SIP as necessary to correct such inadequacies. Further, EPA is establishing a deadline for each state to submit its corrective SIP revision. These deadlines, which differ among the states, range from December 22, 2010, to December 1, 2011.

DATES: This action is effective on December 13, 2010. The deadline for each state to submit its corrective SIP revision is listed in table IV–1, "SIP Call States and SIP Submittal Deadlines" in the **SUPPLEMENTARY INFORMATION** section of this rule.

ADDRESSES: EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2010–0107. 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 U.S. Environmental Protection Agency, Air Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Ms. Lisa Sutton, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–3450; fax number: (919) 541–5509; e-mail address: *sutton.lisa@epa.gov.*

For information related to a specific state, local, or tribal permitting authority, please contact the appropriate EPA regional office:

EPA regional office	Contact for regional office (person, mailing address, telephone number)	Permitting authority
I	Dave Conroy, Chief, Air Programs Branch, EPA Region 1, 5 Post Office Square, Suite 100, Boston, MA 02109–3912, (617) 918–1661.	Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont.
II	Raymond Werner, Chief, Air Programs Branch, EPA Region 2, 290 Broadway, 25th Floor, New York, NY 10007–1866, (212) 637–3706.	New Jersey, New York, Puerto Rico, and Virgin Islands.
III	Kathleen Cox, Chief, Permits and Technical Assessment Branch, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103–2029, (215) 814–2173.	District of Columbia, Delaware, Maryland, Pennsylvania, Virginia, and West Virginia.
IV	Lynorae Benjamin, Chief, Regulatory Development Section, Air, Pesticides and Toxics Management Division, EPA Region 4, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, GA 30303–3104, (404) 562–9033.	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.
V	J. Elmer Bortzer, Chief, Air Programs Branch (AR–18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604–3507, (312) 886–1430.	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.
VI	Jeff Robinson, Chief, Air Permits Section, EPA Region 6, Fountain Place 12th Floor, Suite 1200, 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–6435.	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.
VII	Mark Smith, Chief, Air Permitting and Compliance Branch, EPA Region 7, 901 North 5th Street, Kansas City, KS 66101, (913) 551–7876..	Iowa, Kansas, Missouri, and Nebraska.
VIII	Carl Daly, Unit Leader, Air Permitting, Monitoring & Modeling Unit, EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202–1129, (303) 312–6416.	Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
IX	Gerardo Rios, Chief, Permits Office, EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972–3974.	Arizona; California; Hawaii and the Pacific Islands; Indian Country within Region 9 and Navajo Nation; and Nevada.
X	Nancy Helm, Manager, Federal and Delegated Air Programs Unit, EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101, (206) 553–6908.	Alaska, Idaho, Oregon, and Washington.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities affected by this rule include state and local permitting authorities.[1] In this rule, EPA finds that any state's SIP-approved PSD applicability provisions that do not apply the PSD program to GHG-emitting sources are substantially inadequate to meet CAA requirements, under CAA section 110(k)(5), and such states will be affected by this rule. For example, if a state's PSD regulation identifies its regulated New Source Review (NSR) pollutants by specifically listing each individual pollutant and the list omits GHGs, then the regulation is substantially inadequate.

Entities affected by this rule also include sources in all industry groups, which have a direct obligation under the CAA to obtain a PSD permit for GHGs for projects that meet the applicability thresholds set forth in a GHG PSD rule that EPA recently promulgated, which

[1] For convenience, we refer to "states" in this rulemaking to collectively mean states and local permitting authorities.

[2] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule. 75 FR 31514 (June 3, 2010).

we refer to as the Tailoring Rule.[2] This independent obligation on sources is specific to PSD and derives from CAA section 165(a). The majority of entities affected by this action are in the following groups:

Industry group	NAICS [a]
Utilities (electric, natural gas, other systems)	2211, 2212, 2213
Manufacturing (food, beverages, tobacco, textiles, leather)	311, 312, 313, 314, 315, 316
Wood product, paper manufacturing	321, 322
Petroleum and coal products manufacturing	32411, 32412, 32419
Chemical manufacturing	3251, 3252, 3253, 3254, 3255, 3256, 3259
Rubber product manufacturing	3261, 3262
Miscellaneous chemical products	32552, 32592, 32591, 325182, 32551
Nonmetallic mineral product manufacturing	3271, 3272, 3273, 3274, 3279
Primary and fabricated metal manufacturing	3311, 3312, 3313, 3314, 3315, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329
Machinery manufacturing	3331, 3332, 3333, 3334, 3335, 3336, 3339
Computer and electronic products manufacturing	3341, 3342, 3343, 3344, 3345, 4446
Electrical equipment, appliance, and component manufacturing	3351, 3352, 3353, 3359
Transportation equipment manufacturing	3361, 3362, 3363, 3364, 3365, 3366, 3366, 3369
Furniture and related product manufacturing	3371, 3372, 3379
Miscellaneous manufacturing	3391, 3399
Waste management and remediation	5622, 5629
Hospitals/nursing and residential care facilities	6221, 6231, 6232, 6233, 6239
Personal and laundry services	8122, 8123
Residential/private households	8141
Non-residential (commercial)	Not available. Codes only exist for private households, construction and leasing/sales industries.

[a] North American Industry Classification System.

B. How is the preamble organized?

The information presented in this preamble is organized as follows:

II. Overview of Final Rule

This rulemaking is related to four distinct GHG-related actions recently taken by EPA. Some of these actions, in conjunction with the operation of the applicable CAA provisions, will require stationary sources that emit large amounts of GHGs to obtain a PSD permit before they construct or modify, beginning January 2, 2011. In one of these actions, which we call the Tailoring Rule, EPA limited the applicability of PSD to GHG-emitting sources at or above specified thresholds.[3]

Most states include EPA-approved PSD programs in their state implementation plans (SIPs), and, as a result, they act as the permitting

[2] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule. 75 FR 31514 (June 3, 2010).

[3] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule. 75 FR 31514 (June 3, 2010).

authority. Most of these states' PSD programs apply to GHG-emitting sources, and through a separate regulatory action, EPA and these states are now taking steps to limit the applicability of PSD to GHG-emitting sources at or above the Tailoring Rule thresholds. However, 13 states have SIPs with EPA-approved PSD programs that do not apply PSD to GHG-emitting sources, and it is those states that are the subject of this rulemaking.

In this rulemaking, EPA is (i) issuing a finding of substantial inadequacy for 13 states because their EPA-approved SIP PSD programs do not apply to GHG-emitting sources, (ii) issuing a requirement, which we refer to as a SIP call, that these states submit a corrective SIP revision to assure that their PSD programs will apply to GHG-emitting sources, and (iii) establishing the deadline by which each of these states must submit its corrective SIP revision, which differs among the various states and ranges from December 22, 2010, to December 1, 2011. Each of these actions is authorized under CAA section 110(k)(5). The 13 states (some of which include at least one local permitting agency) are: Arizona; Arkansas; California; Connecticut; Florida; Idaho; Kansas; Kentucky; Nebraska; Nevada; Oregon; Texas; and Wyoming.

If a state for which we are finalizing a SIP call in this action does not submit its corrective SIP revision by its deadline, EPA intends to immediately issue to the state a finding of failure to submit a required SIP revision and also immediately promulgate a federal implementation plan (FIP) for the state, under CAA section 110(c)(1)(A). EPA proposed this SIP call and the FIP by separate notices dated September 2, 2010. "Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call—Proposed Rule," 75 FR 53892; "Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan—Proposed Rule," 75 FR 53883.

This SIP call is important because without it, large GHG-emitting sources in these states may be unable to obtain a PSD permit for their GHG emissions and therefore may face delays in undertaking construction or modification projects. This is because without the further action by the states or EPA that the SIP call is designed to lead to, sources that emit or plan to emit large amounts of GHGs will, starting January 2, 2011, be required to obtain PSD permits before undertaking new construction or modification projects, but neither the states nor EPA would be authorized to issue the permits. The SIP call and, in the states in which it is necessary, the FIP will assure that in each of the 13 states—with the exception of Texas—either the state or EPA will have the authority to issue PSD permits by January 2, 2011, or sufficiently soon thereafter so that sources in the state will not be adversely affected by the short-term lack of a permitting authority. We are planning additional actions to ensure that GHG sources in Texas can be issued permits as of January 2, 2011.

The SIP submittal deadlines that this rule establishes for the states reflect, in almost all instances, a recognition by EPA and the states of the need to move expeditiously to assure the availability of a permitting authority. EPA emphasizes that for those states for which EPA proceeds to promulgate a FIP: (i) The purpose of the FIP is solely to assure that industry in the state will be able to obtain required air permits to construct or modify; (ii) EPA encourages the state to assume delegation of the FIP so that the state will become the permit issuer (although administering EPA regulations); and (iii) EPA will rescind the FIP as soon as the state submits and EPA approves a corrective SIP revision.

The corrective SIP revision that this rule requires must: (i) Apply the SIP PSD program to GHG-emitting sources; (ii) define GHGs as the same pollutant to which the Light-Duty Vehicle Rule [4] (LDVR) applies, that is, a single pollutant that is the aggregate of the group of six gases (carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6)); and (iii) either limit PSD applicability to GHG-emitting sources by adopting the applicability thresholds included in the Tailoring Rule or adopt lower thresholds and show that the state has adequate personnel and funding to administer and implement those lower thresholds.

III. Background

A. CAA and Regulatory Context

EPA described the relevant background information in the SIP call proposal, 75 FR at 53896–98, as well as in the final Tailoring Rule, 75 FR at 31518–21. Knowledge of this background information is presumed and will be only briefly summarized here.

[4] "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25324 (May 7, 2010).

1. SIP PSD Requirements

In general, under the CAA PSD program, as discussed later in this preamble, a stationary source must obtain a permit prior to undertaking construction or modification projects that would result in specified amounts of new or increased emissions of air pollutants that are subject to regulation under other provisions of the CAA. CAA sections 165(a), 169(1), 169(2)(C). The permit must, among other things, include emission limitations associated with the best available control technology (BACT). CAA section 165(a)(4).

Specifically, under the CAA PSD requirements, a new or existing source that emits or has the potential to emit "any air pollutant" in the amounts of either 100 or 250 tons per year (tpy), depending on the source category, cannot construct or modify unless the source first obtains a PSD permit that, among other things, includes emission limitations that qualify as BACT. CAA sections 165(a)(1), 165(a)(4), 169(1). Longstanding EPA regulations have interpreted the term "any air pollutant" more narrowly so that only emissions of any pollutant subject to regulation under the CAA trigger PSD. This interpretation currently is found in 40 CFR 51.166(j)(1), 52.21(j)(2), which applies PSD to any "regulated NSR pollutant," a term that the regulations then define to include four classes of air pollutants, including, as a catch-all, "any pollutant that otherwise is subject to regulation under the Act." 40 CFR 51.166(b)(49)(iv), 52.21(b)(50)(iv).

The CAA contemplates that the PSD program be implemented by the states through their SIPs. CAA section 110(a)(2)(C) requires that:

> Each implementation plan * * * shall * * * include a program to provide for * * * regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in part[] C * * * of this subchapter.

CAA section 110(a)(2)(J) requires that:

> Each implementation plan * * * shall * * * meet the applicable requirements of * * * part C of this subchapter (relating to significant deterioration of air quality and visibility protection).

CAA section 161 provides that:

> Each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part [C], to prevent significant deterioration of air quality for such region * * * designated * * * as attainment or unclassifiable.

These provisions, read in conjunction with the PSD applicability provisions, CAA section 165(a)(1), 169(1), mandate that SIPs include PSD programs that are applicable to any air pollutant that is subject to regulation under the CAA, including, as discussed later in this preamble, GHGs on and after January 2, 2011.[5]

2. Recent EPA Regulatory Action Concerning PSD Requirements for GHG-emitting Sources

In recent months, EPA has taken four distinct actions related to GHGs under the CAA. Some of these, in conjunction with the operation of the CAA, trigger PSD applicability for GHG-emitting sources on and after January 2, 2011, but focus the scope of PSD on the largest GHG-emitting sources. The first of these four actions was what we call the "Endangerment Finding," which is governed by CAA section 202(a). Based on an exhaustive review and analysis of the science, in December 2009 the Administrator exercised her judgment to conclude that "six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations." The Administrator also found "that the combined emissions of these greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas air pollution that endangers public health and welfare under CAA section 202(a)."[6] This Endangerment Finding led directly to promulgation of what we call the "Vehicle Rule" or the "LDVR," also governed by CAA section 202(a), in which EPA set standards for the emission of greenhouse gases for new motor vehicles built for model years 2012–2016.[7] The other two actions were what we call the "Johnson Memo Reconsideration" or the "Timing Decision"[8] and the Tailoring Rule and were governed by the PSD and title V provisions in the CAA. EPA issued them to address the automatic statutory triggering of these programs for greenhouse gases due to the Vehicle Rule's establishing the first controls for greenhouse gases under the Act. More specifically, the Johnson Memo Reconsideration provided EPA's interpretation of a pre-existing definition in its PSD regulations delineating the "pollutants" that are taken into account in determining whether a source must obtain a PSD permit and the pollutants each permit must control. Regarding the Vehicle Rule, the Johnson Memo Reconsideration stated that such regulations, when they take effect on January 2, 2011, will, by operation of the applicable CAA requirements, subject GHG-emitting sources to PSD requirements. The Tailoring Rule limited the applicability of PSD requirements to the largest GHG-emitting sources on a phased-in basis.

Certain specific aspects of these rules are important to highlight for purposes of the present action. In the Endangerment Finding, the Administrator found that six long-lived and directly emitted GHGs—CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6—may reasonably be anticipated to endanger public health and welfare. The LDVR included applicability provisions specifying that the rule "contains standards and other regulations applicable to the emissions of those six greenhouse gases." 75 FR at 25686 (40 CFR 86.1818–12(a)).

In the Tailoring Rule, EPA identified the air pollutant that, if emitted or potentially emitted by the source in excess of specified thresholds, would subject the source to PSD requirements, as the aggregate of the same six GHGs (CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6), based on the LDVR. The Tailoring Rule further provided that for purposes of determining whether the amount of GHGs emitted (or potentially emitted) exceeded the specified thresholds, it must be calculated on both a mass emissions basis and on a carbon dioxide equivalent (CO_2e) basis. With respect to the latter, according to the rule, "PSD * * * applicability is based on the quantity that results when the mass emissions of each of these [six] gases is multiplied by the Global Warming Potential (GWP) of that gas, and then summed for all six gases." 75 FR 31518.

3. SIP Inadequacy and Corrective Action

The CAA provides a mechanism for the correction of SIPs with certain types of inadequacies, under CAA section 110(k)(5), which provides:

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to * * * comply with any requirement of this Act, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.

This provision by its terms authorizes the Administrator to "find[] that [a SIP] * * * is substantially inadequate to * * * comply with any requirement of this Act," and, based on that finding, to "require the State to revise the [SIP] * * * to correct such inadequacies." This latter action is commonly referred to as a "SIP call." In addition, this provision provides that EPA must notify the state of the substantial inadequacy and authorizes EPA to establish a "reasonable deadline[] (not to exceed 18 months after the date of such notice)" for the submission of the corrective SIP revision.

If EPA does not receive the corrective SIP revision by the deadline, CAA section 110(c) authorizes EPA to "find[] that [the] State has failed to make a required submission." CAA section 110(c)(1)(A). Once EPA makes that finding, CAA section 110(c)(1) requires EPA to "promulgate a Federal implementation plan at any time within 2 years after the [finding] * * * unless the State corrects the deficiency, and [EPA] approves the plan or plan revision, before [EPA] promulgates such [FIP]."

4. State PSD SIPs

The states and other jurisdictions in the U.S. may be grouped into three categories with respect to their PSD programs and the applicability of those PSD programs to GHG-emitting sources:

The first category is the states that do not have PSD programs approved into their SIPs. In those states, EPA's regulations at 40 CFR 52.21 govern, and either EPA or the state as EPA's delegatee acts as the permitting authority.[9]

[5] In the Tailoring Rule, we noted that commenters argued, with some variations, that the PSD provisions applied only to National Ambient Air Quality Standards (NAAQS) pollutants, and not GHGs, and we responded that the PSD provisions apply to all pollutants subject to regulation, including GHGs. *See* 75 FR 31560–62; "Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA's Response to Public Comments," May 2010, pp. 38–41. We are not reopening that issue in this rulemaking.

[6] "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66496 (December 15, 2009).

[7] "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25324 (May 7, 2010).

[8] "Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 FR 17004 (April 2, 2010). This action finalizes EPA's response to a petition for reconsideration of "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program" (which we call the "Johnson Memo"), December 18, 2008.

[9] EPA identified the first category of states, local jurisdictions, and Indian country, in the proposal for this action. 75 FR at 53898, n. 11. This list is updated in Declaration of Regina McCarthy, *Coalition for Responsible Regulation* v. *EPA,* DC Cir. No. 09–1322 (and consolidated cases) (McCarthy Declaration), Attachment 1, Table 1,

Continued

The second category comprises states that have approved SIP PSD programs that do not apply to GHG-emitting sources. This second category is the subject of this rulemaking and is discussed further in this preamble.

The third category, which includes most of the states, is states that have approved SIP PSD programs that apply to GHG-emitting sources. Those SIPs have PSD applicability provisions that identify, as some or all of the pollutants covered under their PSD program, any "pollutant subject to regulation" under the CAA. Further, in these states, this term in effect is automatically updating so as to cover pollutants that become newly subject to regulation under the CAA without further action by the state. As a result, the PSD programs of these states will apply to GHG emissions as of January 2, 2011, when GHGs become subject to regulation under the LDVR. *See* 40 CFR 52.21(b)(50).[10]

B. Proposed Action

1. Finding of Substantial Inadequacy and SIP Call

In the proposal for this rulemaking, EPA proposed the SIP call for 13 states whose SIPs have EPA-approved PSD programs but did not appear to apply to GHG-emitting sources. These 13 states are listed in table III–1:

TABLE III–1—STATES WITH SIPS THAT EPA PROPOSED DO NOT APPEAR TO APPLY PSD TO GHG SOURCES

[Presumptive SIP Call List]

State (or area)
Alaska
Arizona: Pinal County; Rest of State (Excludes Maricopa County, Pima County, and Indian Country)
Arkansas
California: Sacramento Metropolitan AQMD
Connecticut
Florida
Idaho
Kansas
Kentucky: Jefferson County; Rest of State

TABLE III–1—STATES WITH SIPS THAT EPA PROPOSED DO NOT APPEAR TO APPLY PSD TO GHG SOURCES—Continued

[Presumptive SIP Call List]

State (or area)
Nebraska
Nevada: Clark County
Oregon
Texas

In the proposal, EPA explained that it had identified these 13 states on the basis of EPA's review of the SIP PSD provisions and other relevant state law, as well as the views of the states as expressed in their written statements to EPA following promulgation of the Tailoring Rule and in other communications with the EPA regions. EPA further explained that this information appeared to indicate that these SIP PSD provisions did not apply to GHG-emitting sources because of one or another of the following problems, depending on the state: (i) The PSD applicability provision applies to any "pollutant subject to regulation" under the CAA, but other provisions of state law preclude what we call automatic updating or forward adoption, so that this applicability provision covers only pollutants—not including GHGs—that were subject to regulation at the time the state promulgated or enacted the applicability provision; (ii) the PSD applicability provision does not apply to any "pollutant subject to regulation" under the CAA and instead applies to only specifically identified pollutants, not including GHGs; or (iii) the SIP explicitly precludes regulation of CO_2. On the other hand, EPA further recognized in the proposal that a state that fits into one of the earlier-described subcategories might nevertheless have in its SIP or other state laws a "general authority clause" that affirms the state's legal authority to issue, and enforce compliance with, permits that are consistent with federal requirements. In this case, the SIP, read as a whole, may be considered to apply PSD to GHG sources. Even so, we added that if a SIP appeared ambiguous as to whether it applied PSD to GHG-emitting sources (*e.g.,* it includes an applicability provision that explicitly excludes GHG sources but also includes a general-authority provision that could be read to authorize permitting of GHG sources), we would consider the SIP PSD program not to apply to GHG sources.

As a related matter, we noted that if a state with a SIP that did not appear to apply PSD to GHG-emitting sources submitted a SIP revision prior to December 1, 2010—the date EPA intended to issue the SIP call—EPA would not include that state in the SIP call.

EPA included with the proposal a technical support document (TSD) that addressed each state with an approved PSD program that did not at time of proposal appear to apply to GHG-emitting sources. The TSD referenced the applicable state law and the position of the state as to PSD applicability for GHG-emitting sources, based on communications to EPA. EPA also included in the TSD much the same information for each state with an approved PSD program that did at time of proposal appear to apply to GHG-emitting sources.

For each of the 13 states, EPA proposed to issue a finding that the SIP is "substantially inadequate * * * to * * * comply with any requirement of [the CAA]" and EPA proposed to "require the State to revise the plan as necessary to correct such inadequacies," *i.e.,* EPA proposed to issue a SIP call in accordance with CAA section 110(k)(5). EPA explained that the reference in CAA section 110(k)(5) to "any requirement of [the CAA]" includes the PSD requirements and that SIPs are therefore required to include PSD programs that apply to sources that emit pollutants subject to regulation. As a result, EPA proposed the 13 states' SIPs merit a finding of substantial inadequacy because they fail to apply the PSD program to GHG-emitting sources on and after January 2, 2011. EPA further proposed that because the SIPs merit a finding of substantial inadequacy, EPA is authorized to issue a SIP call and thereby require a corrective SIP revision.

EPA invited comment on its legal interpretation of the 13 states' SIPs and made clear that for any of these states, if EPA did not receive any further information from the state or other commenters indicating that EPA's proposed interpretation was incorrect, EPA intended to finalize the SIP call, but that on the other hand, if EPA did receive further information indicating that the proposed interpretation was incorrect, then EPA would not finalize the SIP call.

In addition, EPA specifically solicited comment on its interpretation that the approved SIPs for the other states do appear to apply their PSD program to GHG-emitting sources. EPA indicated that if it received comments indicating, for any of these latter states, that the SIP does not apply PSD to GHG sources, then, without further proposed action, EPA would issue a final finding of substantial inadequacy and SIP call for

which can be found in the docket for this rulemaking, except that the Northern Mariana Islands and the Trust Territories also fall into this category. EPA is not taking any final action with respect to these jurisdictions, and EPA's identification of them in this action is for informational purposes only.

[10] EPA included in the proposal a list of states and local jurisdictions that appeared to fall into this third category. 75 FR at 53899, table IV–2. This list is updated in Declaration of Regina McCarthy, *Coalition for Responsible Regulation* v. *EPA,* DC Cir. No. 09–1322 (and consolidated cases) (McCarthy Declaration), Attachment 1, Table 3, which can be found in the docket for this rulemaking. Except to the extent discussed later in this preamble, EPA is not taking final action in this rule with respect to these states and local jurisdictions.

that state. EPA identified these states as listed in table III–2, "States with SIPs that EPA Proposed Appear to Apply PSD to GHG Sources (Presumptive Adequacy List)." [11]

TABLE III–2—STATES WITH SIPS THAT EPA PROPOSED APPEAR TO APPLY PSD TO GHG SOURCES

[Presumptive Adequacy List]

State (or area)
Alabama: Jefferson County; Huntsville; Rest of State
California: Mendocino County AQMD; Monterey Bay Unified APCD; North Coast Unified AQMD; Northern Sonoma County APCD
Colorado
Delaware
Georgia
Indiana
Iowa
Louisiana
Maine
Maryland
Michigan
Mississippi
Missouri
Montana
New Hampshire
New Mexico: Albuquerque; Rest of State
North Carolina: Forsyth County; Mecklenburg; Western NC; Rest of State
North Dakota
Ohio
Oklahoma
Pennsylvania: All except Allegheny County [12]
Rhode Island
South Carolina
South Dakota
Tennessee: Chattanooga; Nashville; Knoxville; Memphis; Rest of State
Utah
Vermont
Virginia
West Virginia
Wisconsin [13]
Wyoming [13]

We further stated in the proposal that we intended to finalize the finding of substantial inadequacy and the SIP call on or about December 1, 2010, approximately one month in advance of the January 2, 2011, date when PSD requirements will first apply to GHG-emitting sources. We justified this timing on the need to give sources notice that the PSD requirements apply. In addition, we recognized that as a practical matter, some states would not object to our imposing a FIP effective as of January 2, 2011, in order to avoid any period of time when the GHG-emitting sources identified in the Tailoring Rule as subject to PSD would be unable to obtain a permit due to lack of a permitting authority to process their PSD applications. We observed that we could not impose a FIP until we have first finalized the SIP call and given the state a reasonable period of time to make the corrective SIP submission.

In the proposal, we also described in greater detail the process for finalizing the SIP call. We stated that we would issue the final SIP call for any state for which we had concluded that the PSD program did not as of that date apply to GHG-emitting sources. However, if a state that was included in the proposed SIP call were to submit a SIP revision by December 1, 2010, that purported to correct that inadequacy, we would not finalize the finding or SIP call for that state. Rather, we would take action on its SIP submittal as promptly as possible. While we will strive to expedite approval of such SIP submissions, we could not commit in the proposal to approving them by January 2, 2011. We therefore cautioned in our proposal (*see* 75 FR at 53904) that states with submitted (but not EPA-approved) SIP revisions will not be able to issue federally approved PSD permits until those SIP revisions are approved. We stated that for all other states for which we concluded that the PSD program did not apply to GHG sources, on or about December 1, 2010, we would make the finding of substantial inadequacy and issue the SIP call in a final rule and submit the notice for the rule for publication in the **Federal Register** as soon as possible thereafter. We stated that at the same time, we would also notify the state of the finding of substantial inadequacy by letter and by posting the signed SIP call rulemaking on our Web site. In view of the urgency of the task, which is to do everything possible to ensure that a PSD permitting authority for affected GHG sources is in place by January 2, 2011, we proposed to give the final SIP call an effective date of its publication date. We recognized that this process is highly expedited, but we stated that it was essential to maximize our and the states' opportunity to put in place a permitting authority to process PSD permit applications beginning on January 2, 2011, without which sources may be unable to proceed with plans to construct or modify.

In the proposal, EPA discussed in some detail the SIP submittal deadline it was proposing to establish under CAA section 110(k)(5). Under this provision, in notifying the state of the finding of substantial inadequacy and issuing the SIP call, EPA "may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions." EPA proposed to allow the state up to 12 months from the date of signature of the final finding of substantial inadequacy and SIP call within which to submit the SIP revision, unless, during the comment period, the state expressly advised that it would not object to a shorter period—as short as 3 weeks from the date of signature of the final rule—in which case EPA would establish the shorter period as the deadline. EPA stated that, assuming that EPA were to finalize the SIP call on or about December 1, 2010, as EPA said it intended to do in the proposal, then the earliest possible SIP submittal deadline would be December 22, 2010.

A few states did not inform EPA until after the end of the comment period for the proposed SIP call that they would not object to a deadline earlier than December 2011. Nevertheless, we considered their responses when establishing their SIP submittal deadlines in this final action.

EPA made clear that the purpose of establishing the shorter period as the deadline—for any state that advises us that it does not object to that shorter period—is to accommodate states that wish to ensure that a FIP is in effect as a backstop to avoid any gap in PSD permitting. EPA also made clear that if a state did not advise EPA that it does not object to a shorter deadline, then the 12-month deadline would apply. EPA emphasized that for any state that receives a deadline after January 2, 2011, the affected GHG-emitting sources in that state may be delayed in their ability to receive a federally approved permit authorizing construction or modification. That is, after January 2, 2011, these sources may not have available a permitting authority to review their permit applications until

[11] Note that in this final rule, except for any of these states for which EPA is making a finding of substantial inadequacy and issuing a SIP call, EPA is not taking any action with respect to these states.

[12] Pennsylvania's Philadelphia County correctly belongs in the category of states that do not have PSD programs approved into their SIPs. We note this correction for informational purposes only, as it has no bearing on this rulemaking. A corrected table III–2 would list, "Pennsylvania: All except Allegheny County and Philadelphia County." However, we have not reflected the correction in table III–2 itself, for the reason that the table represents our proposed list. In addition, as noted above, an updated version of this category of jurisdictions—those that have approved PSD SIPs that apply to GHG-emitting sources—appears in Declaration of Regina McCarthy, *Coalition for Responsible Regulation* v. *EPA,* DC Cir. No. 09–1322 (and consolidated cases) (McCarthy Declaration), Attachment 1, Table 3, which can be found in the docket for this rulemaking.

[13] Note that in this final action, we are issuing a SIP call for Wyoming, based on information submitted by the state during the SIP call comment period.

the date that EPA either approves the SIP submittal or promulgates a FIP.

EPA proposed that this 3-week-to-12-month time period, although expedited, meets the CAA section 110(k)(5) requirement as a "reasonable" deadline in light of: (i) The SIP development and submission process; (ii) the preference of the state; and (iii) the imperative to minimize the period when sources will be subject to PSD but will not have available a PSD permitting authority to act on their permit application and therefore may face delays in constructing or modifying.

2. Corrective SIP Revision

EPA proposed certain requirements for each state receiving a SIP call. The central requirement is that the corrective SIP revision must apply the PSD program to GHG-emitting sources. EPA proposed two different ways for the SIP revision to do so: First, the SIP revision could revise the PSD applicability provisions or other provisions of the SIP or state law that affect PSD applicability, to assure that the PSD applicability provisions are automatically updating. This means that these provisions would apply PSD to any air pollutant as soon as the pollutant becomes newly subject to regulation under the CAA. As a result, the PSD applicability provisions will apply to GHGs as of January 2, 2011. In this case, EPA would approve the SIP revision as fully meeting the CAA requirements. Second, and as an alternative, the SIP revision could simply specifically identify GHGs as subject to PSD applicability, in which case EPA would approve the SIP revision on the basis that the revision is SIP-strengthening, as discussed later in this preamble.

In addition, EPA proposed to require that the corrective SIP revision, in applying the PSD program to GHG-emitting sources, must either limit PSD applicability to GHG-emitting sources at or above the Tailoring Rule thresholds or adopt lower thresholds. However, EPA added that if the state adopts lower thresholds, then the state must demonstrate that it has "adequate personnel [and] funding * * * to carry out," that is, administer and implement, the PSD program with those lower thresholds, in accordance with CAA section 110(a)(2)(E)(i).

EPA also noted in the proposal that the state must define GHGs as a single pollutant that is the aggregate of the group of six gases: CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6, which is the pollutant that the LDVR subjected to regulation. EPA further noted in the proposal that in the Tailoring Rule, EPA adopted a carbon dioxide equivalent (CO_2e) metric and use of short tons (as opposed to metric tons) for calculating GHG emissions in order to implement the Tailoring Rule thresholds. 75 FR at 31530, 31532. A state retains the authority to adopt lower thresholds than in the Tailoring Rule in order to meet statutory requirements, and, as a result, EPA stated in the proposal that the state is not obligated to adopt the CO_2e metric or use of short tons in the corrective SIP revision. However, if the state wishes to adopt the Tailoring Rule thresholds, but through a different approach, then the state must assure that its approach is at least as stringent as under the Tailoring Rule.

As we noted in the preamble to the proposed rulemaking (75 FR at 53902), EPA issued a Call for Information (CFI) to solicit public comment and data on technical issues that might be used to consider biomass fuels and the emissions resulting from their combustion differently with regard to applicability under PSD and with regard to the BACT review process under PSD. Subsequently, EPA discussed these considerations in its "PSD and Title V Permitting Guidance for Greenhouse Gases" [14] that was released on November 10, 2010, and made available for public comment. In that GHG permitting guidance document, EPA described on pages 8 through 10 how permitting authorities may consider the use of biomass for energy generation when carrying out their BACT analyses for GHGs. EPA also described plans for future guidance regarding analysis of the environmental, energy, and economic benefits of biomass in GHG BACT determinations.[15]

[14] *See http://www.epa.gov/nsr/ghgpermitting.html/*for more information on EPA's recent GHG permitting guidance document and on EPA's other permitting guidance for GHGs.

[15] Specifically, we stated the following in "PSD and Title V Permitting Guidance for Greenhouse Gases," pages 8–10: In the annual US inventory of GHG emissions and sinks, EPA has reported that the Land-Use, Land-Use Change and Forestry (LULUCF) sector (including those stationary sources using biomass for energy) in the United States is a net carbon sink, taking into account the carbon gains (*e.g.,* terrestrial sequestration) and losses (*e.g.,* emissions or harvesting) from that sector. [*Footnote:* 2010 US Inventory Report at *http://epa.gov/climatechange/emissions/usinventoryreport.html*.] On the basis of the Inventory results and other considerations, numerous stakeholders requested that EPA exclude, either partially or wholly, emissions of GHG from bioenergy and other biogenic sources for the purposes of the BACT analysis and the PSD program based on the view that the biomass used to produce bioenergy feedstocks can also be a carbon sink and therefore management of that biomass can play a role in reducing GHGs. [*Footnote:* GHG emissions from bioenergy and other biogenic sources are generated during combustion or decomposition of biologically-based material, and include sources such as utilization of forest or agricultural products for energy, wastewater treatment and livestock management facilities, and fermentation processes for ethanol production.] EPA plans to provide further guidance on the how to consider the unique GHG attributes of biomass as fuel.

Even before EPA takes further action, however, permitting authorities may consider, when carrying out their BACT analyses for GHG, the environmental, energy and economic benefits that may accrue from the use of certain types of biomass and other biogenic sources (*e.g.,* biogas from landfills) for energy generation, consistent with existing air quality standards. In particular, a variety of federal and state policies have recognized that some types of biomass can be part of a national strategy to reduce dependence on fossil fuels and to reduce emissions of GHGs. Federal and state policies, along with a number of state and regional efforts, are currently under way to foster the expansion of renewable resources and promote biomass as a way of addressing climate change and enhancing forest-management. EPA believes that it is appropriate for permitting authorities to account for both existing federal and state policies and their underlying objectives in evaluating the environmental, energy and economic benefits of biomass fuel. Based on these considerations, permitting authorities might determine that, with respect to the biomass component of a facility's fuel stream, certain types of biomass by themselves are BACT for GHGs.

To assist permitting authorities further in considering these factors, as well as to provide a measure of national consistency and certainty, EPA intends to issue guidance in January 2011 that will provide a suggested framework for undertaking an analysis of the environmental, energy and economic benefits of biomass in Step 4 of the top-down BACT process, that, as a result, may enable permitting authorities to simplify and streamline BACT determinations with respect to certain types of biomass.

The guidance will include qualitative information on useful issues to consider with respect to biomass combustion, such as specific feedstock types and trends in carbon stocks at different spatial scales (national, regional, state). The aim of the information will be to assist permitting authorities in evaluating "carbon neutrality" in the assessment of environmental, energy and economic impacts of control strategies under Step 4 of the BACT process, which, again, may enable the streamlining of BACT determinations with respect to certain types of biomass. The agency is currently reviewing the comments received in response to the July 15, 2010 Call for Information (CFI) that solicited feedback from stakeholders on approaches to accounting for GHG emissions from bioenergy and other biogenic sources. [*Footnote:* The Call for Information was published on July 15, 2010. (75 FR 41173 and 75 FR 45112). EPA received over 7,000 comments and is still assessing them.] These comments, among other things, suggest that certain biomass feedstocks (*e.g.,* biogas) may be considered carbon neutral with minor additional analysis. Such a carbon benefit may further inform the BACT process, especially where a permitting authority considers the net carbon impact or carbon-neutrality of certain feedstocks in accounting for the broader environmental implications of using particular biomass feedstocks.

Finally, EPA also plans to determine by May 2011, well before the start of the second phase of PSD implementation pursuant to the Tailoring Rule, whether the issuance of a supplemental rule is appropriate to address whether the Clean Air Act would allow the Agency and permitting authorities or permitted sources, when determining the applicability of PSD permitting requirements to sources of biogenic emissions, to quantify carbon emissions from bioenergy or biogenic sources by applying separate accounting rules for different

IV. Final Action and Response to Comments

A. Process for Response to Comments

We proposed our SIP call and FIP actions as companion proposals. Both proposals were signed by the Administrator and made publicly available on August 12, 2010, and both proposals were published in the **Federal Register** on September 2, 2010. The SIP call and FIP actions share a rulemaking docket, and the majority of comments that were submitted to EPA during the proposals' comment periods were provided in the form of a letter that intermingled comments on the SIP call and the FIP actions. We respond to comments on the SIP call proposal in this preamble, in a Response to Comment Document for the SIP call, and in a Supplemental Information Document for the SIP call. The Response to Comment Document and Supplemental Information Document can be found in the docket for this action. We will respond to comments on the FIP when we finalize that action.

B. Finding of Substantial Inadequacy and SIP Call

In this action, EPA is finalizing its proposal, under CAA section 110(k)(5), to: (i) Issue a finding that the SIPs for 13 states (comprising 15 state and local programs) are "substantially inadequate to * * * comply with any requirement of this Act" because their PSD programs do not apply to GHG-emitting sources as of January 2, 2011; (ii) "require[] the state[s] to revise the [SIP] * * * to correct such inadequacies," that is, to issue a SIP call requiring submission of a corrective SIP revision; and (iii) establish a "reasonable deadline[] (not to exceed 18 months after the date of such notice)" for the submission of the corrective SIP revision. This deadline ranges, for different states, from 3 weeks to 12 months after the date of this action. The 13 states and their deadlines are listed in table IV–1, "SIP Call States and SIP Submittal Deadlines":

TABLE IV–1—SIP CALL STATES AND SIP SUBMITTAL DEADLINES

State (or area)	SIP submittal deadline
Arizona: Pinal County	12/22/10
Arizona: Rest of State (Excludes Maricopa County, Pima County, and Indian Country)	12/22/10
Arkansas	12/22/10
California: Sacramento Metropolitan AQMD	01/31/11
Connecticut	03/01/11
Florida	12/22/10
Idaho	12/22/10
Kansas	12/22/10
Kentucky (Jefferson County): Louisville Metro Air Pollution Control District	01/01/11
Kentucky: Rest of State (Excludes Louisville Metro Air Pollution Control District (Jefferson County))	03/31/11
Nebraska	03/01/11
Nevada: Clark County	07/01/11
Oregon	12/22/10
Texas	12/01/11
Wyoming	12/22/10

This final rule is consistent with EPA's proposal, except that (i) EPA is not finalizing the SIP call with respect to one state for which EPA proposed the SIP call, namely Alaska, because it has already submitted a revised SIP, and (ii) EPA is finalizing the SIP call with respect to one state for which EPA solicited comment but did not propose the SIP call, namely Wyoming.

In this section of this preamble, we: (1) Explain in detail our overall basis for these actions, including responding to comments on that overall basis; and (2) explain concisely our basis for action for each of the 13 states. In a Supplemental Information Document, which can be found in the docket for this rulemaking, we include more detail for our explanations and we respond to state-specific comments we received in response to the proposed actions.

1. Overall Basis

a. Finding of Substantial Inadequacy: Final Action and Response to Comments

(i) Final Action

Our overall basis for issuing the finding of substantial inadequacy and issuing the SIP call for the 13 states is the same as we stated during the proposal. As summarized earlier in this preamble, for each of these 13 states, EPA finds that the failure of the SIP PSD applicability provisions to apply to GHG-emitting sources renders the SIP "substantially inadequate * * * to * * * comply with any requirement of [the CAA]" and as a result, EPA "require[s] the State to revise the plan as necessary to correct such inadequacies," *i.e.,* issues a SIP call, all in accordance with CAA section 110(k)(5).

We consider the legal basis to be straightforward. CAA section 110(k)(5), as quoted earlier in this preamble, authorizes EPA to issue a finding that a SIP is "substantially inadequate" to meet CAA requirements. The CAA does not define the quoted term, and as a result, it should be given its ordinary, everyday meaning. In the present case, the failure of a SIP to apply PSD to GHG-emitting sources means that the SIP is "substantially inadequate" to comply with CAA requirements because (i) The CAA requires that SIP PSD programs apply PSD to GHG-emitting sources, (ii) the SIPs at issue fail to do so, and (iii) applying PSD to GHG-emitting sources would affect a large number of sources and permitting actions.

CAA section 110(k)(5) authorizes EPA to issue a finding of substantial inadequacy whenever the SIP fails to comply with "any requirement of [the CAA]." CAA section 165(a)(1) provides that "[n]o major emitting facility * * * may be constructed * * * unless * * * a [PSD] permit has been issued for such proposed facility in accordance with this part." CAA section 169(1) defines "major emitting facility" as any stationary source that emits specified quantities of "any air pollutant." EPA regulations have long defined "any air pollutant" as, at least in part, "any pollutant * * * subject to regulation under the Act." 40 CFR 52.21(b)(50)(iv). Further, CAA section 161 requires SIPs to contain "emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality * * *" and CAA section 110(a)(2)(J) requires that "[e]ach [SIP] * * * meet the applicable requirements of * * * part C of this subchapter (relating to significant deterioration of air quality." Reading these provisions together, the CAA requires that PSD requirements apply to any stationary source that emits specified quantities of any air pollutant subject to regulation under the CAA, and those PSD requirements must be included in the approved SIPs.[16]

types of feedstocks that reflect the net impact of their carbon emissions. This determination will take into consideration both the LULUCF inventory and the full record of responses to the CFI.

[16] EPA has long interpreted the PSD applicability provisions in the CAA to be self-executing, that is, they apply by their terms so that a source that emits any air pollutant subject to regulation becomes subject to PSD—and, therefore, cannot construct or modify without obtaining a PSD permit—and these provisions apply by their terms in this manner regardless of whether the state has an approved SIP PSD program. What's more, until an applicable implementation plan is in place—either an approved SIP or a FIP—no permitting authority is

Continued

As of January 2, 2011, GHG-emitting sources will become subject to PSD. As a result, the CAA provisions described earlier in this preamble require PSD programs to apply to GHG-emitting sources. Accordingly, it is clear that the failure of any SIP PSD applicability provisions to apply the PSD program to GHG-emitting sources means that the SIP fails to comply with these CAA requirements.

Moreover, in this case, the failure of the SIPs to apply PSD to GHG-emitting sources will affect a substantial number of sources and permitting actions. EPA estimated in the Tailoring Rule that on a nationwide basis, many of the sources that now require PSD permit applications due to their emissions of non-GHG pollutants (which we call "anyway" sources) also emit GHG pollutants in quantities that will trigger the application of PSD. On average, on an annual basis nationwide, these sources submit 688 PSD permit applications. 75 FR at 31540. In addition, EPA estimated that beginning on July 2, 2011, on an annual basis nationwide, another 917 permit applications would potentially be submitted due to the GHG emissions of sources undertaking construction or modification activities, even though these sources' other pollutants would not, in and of themselves, trigger PSD. *Id.* Thus, large numbers of permitting actions are at issue. Moreover, the principal PSD requirement that will apply to GHG-emitting sources is the requirement to implement BACT, which is the principal mechanism under the PSD provisions for controlling emissions from non-NAAQS pollutants.

The failure of a SIP to apply PSD to GHG-emitting sources—when the SIP is required to apply PSD to GHG-emitting sources and when doing so would, on average, result in a significant number of additional permitting actions subject to PSD—justifies a finding by the Administrator that a SIP that does not apply PSD to such sources as of January 2, 2011, is "substantially inadequate" to comply with CAA requirements.

authorized to issue a permit to the source. In a recent decision, the 7th Circuit, mistakenly citing to PSD provisions when the issue before the court involved the separate and different non-attainment provisions of CAA sections 171–193, concluded that sources could continue to abide by permitting requirements in an existing SIP until amended, even if that SIP does not comport with the law. *United States* v. *Cinergy Corp.,* No. 09–3344, 2010 WL 4009180 (7th Cir. Oct. 12, 2010). In stark contrast to the nonattainment provisions actually at issue in Cinergy—which are not self-executing and must therefore be enforced through a SIP—PSD is self-executing; it is the statute (CAA section 165), not just the SIP, that prohibits a source from constructing a project without a permit issued in accordance with the Act.

(ii) Response to Comments

(I) Pollutants Subject to the SIP Call

Some commenters stated that failure of a SIP to require PSD permits for GHG-emitting sources does not constitute a "substantial[] inadequa[cy]" under CAA section 110(k)(5). In making this point, the commenters first state that "PSD can only be triggered by pollutants for which EPA has issued a national ambient air quality standard ("NAAQS") and only in attainment areas for such pollutants." The commenters go on to assert that whether a SIP can be considered substantially inadequate due to its failure to require PSD permits depends on the extent to which the foregone controls "affect * * * the state's ability to attain a NAAQS." Then, the commenters claim that the numbers of permits that the state would be required to issue that would include GHG controls beginning January 2, 2011, will be such "a small number" that "the lack of a BACT limit for [GHGs] would not affect in any way the state's ability to attain a NAAQS." The commenters explain that the number of permits that would be required for GHG sources under the Tailoring Rule is limited to, on an annual basis, on average, in each state, (i) beginning as of January 2, 2011, "one or two permits" for sources that would be subject to PSD anyway due to their emissions of other pollutants (which, again, we call "anyway" sources), plus (ii) beginning as of July 1, 2011, 11 permits for sources that would become subject to PSD solely because of their emissions of GHGs.[17] Again, the commenters assert that the controls foregone from this "small number" of permits would have too little an impact on a state's ability to attain a NAAQS to justify finding the SIP to be substantially inadequate under CAA section 110(k)(5).

We find this argument unpersuasive for several reasons. Most importantly, we do not accept what appear to be the premises of this argument, which are that PSD can only be triggered for NAAQS pollutants and that whether deficiencies in a PSD program can render a SIP substantially inadequate depend only on whether any foregone controls affect the state's ability to maintain a NAAQS. In the Tailoring Rule, we addressed at length the comment that PSD can be triggered only by pollutants subject to the NAAQS, and we concluded that as a matter of *Chevron* Step 1, this view was incorrect and that, instead, PSD applies to non-NAAQS pollutants, including GHGs. (*See* discussion in Tailoring Rule preamble, 75 FR at 31514 and elsewhere.)[18] In this rulemaking, we are not reopening that issue. We did not solicit comment on it and our response to this comment should not be construed to be a reopening.

Second, we believe that the commenters have understated the number of permitting actions that will involve GHG controls. As noted earlier in this preamble, we provided estimates of the numbers of permits in the Tailoring Rule. There, we addressed at length the numbers of permitting actions that would involve GHGs, including soliciting comment on our proposed estimates and revising our final estimates based on comments received. In this rulemaking, the GHG PSD SIP call, we are not reopening that issue. We did not solicit comment on it and our response to this comment should not be construed to be a reopening. As noted earlier in this preamble and also in the Tailoring Rule, we estimated that on an annual basis, nationwide, beginning January 2, 2011, there would be 688 permitting actions for "anyway" sources that would require GHG controls, and, beginning July 1, 2011, there would be an additional 917 permitting actions per year. These totals are significantly higher than the commenters' estimates.[19]

Commenters also state that "EPA's own actions further reveal the flaw in its analysis." They note that EPA has proposed to issue the SIP call on grounds that some of the SIPs apply PSD to only criteria pollutants and not

[17] In another part of their comments, commenters state that the total number of affected permits is "a few permits with GHG limits in the first 6 months of 2011."

[18] We also explained our view that PSD may be triggered by non-NAAQS pollutants such as GHGs in the Tailoring Rule response to comments document ("Prevention of Significant Deterioration and Title V GHG Tailoring Rule: EPA's Response to Public Comments"), pp. 34–41; and in EPA's response to motions for a stay filed in the litigation concerning those rules ("EPA's Response to Motions for Stay," *Coalition for Responsible Regulation* v. *EPA,* DC Cir. No. 09–1322 (and consolidated cases)), at 47–59.

[19] Although, again, we are not reopening in this rule the issue of the number of permits that would include GHG controls, we note the following additional reasons why we do not find the commenters' estimates persuasive: (i) The commenters stated that they were adjusting downward what they described as EPA's estimates for "anyway" sources, but the commenters did not provide a basis for that downward adjustment. (ii) Some of the commenters have also brought lawsuits against the Tailoring Rule, and in court papers filed at approximately the same time as their comments in this rulemaking, they stated that the numbers of affected permits would be significantly higher than the numbers that they stated in their comments in this rulemaking. National Association of Manufacturers, *et al.,* "Petitioner's Motion for Partial Stay of EPA's Greenhouse Gas Regulations," *Coalition for Responsible Regulation* v. *EPA,* DC Cir. No. 09–1322 (and consolidated cases) at 45, 47.

to pollutants other than criteria pollutants, and they state that these SIPs have applied to only criteria pollutants for "many years." The commenters argue that EPA has never, up until now, issued a SIP call on the basis that the PSD provisions in the SIPs do not cover pollutants more broadly.

Commenters appear to infer from EPA's failure to have initiated a SIP call for these states in the past an indication that EPA does not have authority to do so. That inference is simply incorrect. An agency's not taking certain action at one point in time does not indicate a lack of authority to take that action, nor is the agency required to explain its earlier inaction in order to justify subsequent action. An agency may properly address an issue in step-by-step fashion. *See, e.g., Grand Canyon Air Tour Coalition* v. *F.A.A.,* 154 F.3d 455 (DC Cir. 1998), *City of Las Vegas* v. *Lujan,* 891 F.2d 927 (DC Cir. 1989). 75 FR at 31544. In addition, as discussed later in this preamble, EPA has discretion in deciding whether, and when, to issue a finding of substantial inadequacy. Moreover, commenters have pointed to no statements by EPA indicating that SIPs that do not apply PSD to all pollutants subject to regulation fully meet CAA requirements; on the contrary, in the 2002 NSR Reform rule,[20] EPA specifically required SIP revisions to apply PSD to all pollutants subject to regulation.

(II) Requirements of Tailoring Rule

(A) Comment

Some industry commenters stated that EPA had no basis to issue a SIP call, and so should withdraw the proposal, because EPA was required to give states 3 years from the date the Tailoring Rule was published (June 3, 2010) to submit SIP revisions implementing PSD requirements for GHG-emitting sources. The commenters' premise is that without the Tailoring Rule, PSD would not apply to GHG-emitting sources, and the Tailoring Rule imposed the requirement that PSD applies to GHG-emitting sources. As evidence for its premise that the Tailoring Rule imposed this requirement, the commenters point to the fact that EPA codified certain provisions in 40 CFR 51.166, including, for example, provisions concerning the definition of GHGs.

As a corollary to their premise, the commenters take the position that EPA regulations establishing the process for SIPs to adopt PSD program requirements govern and, therefore, require EPA to give the states up to 3 years to submit their SIP revisions that incorporate what the commenters view as the Tailoring Rule's requirement to apply PSD to GHG-emitting sources. *See* 40 CFR 51.166(a)(6) ("Any state required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph (a)(6)(i), shall adopt and submit such plan revision to the Administrator for approval no later than three years after such amendment is published in the Federal Register."). The commenters add that during this 3-year period, the Tailoring Rule requirements that PSD applies to GHG-emitting sources do not apply in the states. Rather, according to the commenters, state permitting authorities may continue to issue PSD permits that do not include requirements for GHGs.

Commenters also argue that CAA section 110(a)(1), which requires SIP submittal "within 3 years (or such shorter period as the Administrator may prescribe)," supports a 3-year period for the SIPs required under the SIP call. Another commenter takes a similar position but points to CAA section 166, which, the commenter asserts, provides a 21-month period for SIP submissions and also prevents the application of PSD to GHG-emitting sources in the meantime.

Turning to the SIP call, the commenters view the purpose of the SIP call as requiring the state to adopt what the commenters call the Tailoring Rule's requirements to apply PSD to GHG-emitting sources. The commenters assert that because, in their view, the adoption process of 40 CFR 51.166(a)(6) applies—which allows states 3 years to adopt the SIP revision and, in the meantime, allows states to continue to issue permits without GHG controls—the SIP call (with its 12-month or shorter deadlines) does not apply and EPA should withdraw its SIP call proposal.

Continuing to focus on the SIP call, one of the industry commenters adds: "In the proposed SIP Call rule, EPA characterizes the Tailoring Rule as creating a PSD permit moratorium, beginning on the [January 2, 2011 and July 1, 2011 phase-in] dates, with regard to those sources whose GHG emissions are above the applicable Tailoring Rule thresholds." This commenter argues that "EPA's premise that the Tailoring Rule imposes a construction moratorium, absent a SIP revision or a FIP, beginning on January 2, 2011, is unlawful and should be abandoned." This commenter appears to ascribe to EPA the view that the construction ban is a sort of sanction that EPA may impose; the commenter appears to read the proposed SIP call as characterizing the Tailoring Rule as attempting to use the construction moratorium in that manner. The commenter does not cite any statement in the proposed SIP call that characterizes the Tailoring Rule in that manner or any provision in the Tailoring Rule that could be read to attempt to use the construction moratorium in that manner.

(B) Response

The commenters have misstated what the Tailoring Rule did and, in so doing, have misstated the source of the requirement that PSD applies to GHG-emitting sources. Contrary to what the commenters state, the Tailoring Rule did not establish the requirement that PSD apply to GHG-emitting sources. This requirement was established by operation of the applicable CAA provisions, in conjunction with the LDVR. That is, the CAA requirements (i) prohibit "major emitting facilit[ies]" from constructing or modifying without obtaining a permit that meets the PSD requirements, CAA section 165(a)(1), and (ii) define a "major emitting facility" as a source that emits a specified quantity of "any air pollutant," CAA section 169(1), which EPA has long interpreted as any pollutant subject to regulation. In this manner, the CAA requirements for PSD applicability are what we call automatically updating, that is, whenever EPA regulates a previously unregulated pollutant, PSD applies at that time to that pollutant without further regulatory action by EPA.

EPA regulations have long codified this automatically updating aspect of the CAA PSD requirements. *See* 43 FR 26380, 26403/3, 26406 (June 19, 1978) (promulgating 40 CFR 51.21(b)(1)(i)) and 42 FR 57479, 57480, 57483 (November 3, 1977) (proposing 40 CFR 51.21(b)(1)(i)) (applying PSD requirements to a "major stationary source" and defining that term to include sources that emit specified quantities of "any air pollutant regulated under the Clean Air Act"). Most recently, in our 2002 NSR Reform rule, EPA reiterated these requirements, although changing the terminology. 67 FR 80186 (December 31, 2002). Specifically, EPA required that emissions of "any regulated NSR pollutant" be subject to PSD requirements when emitted in specified quantities by sources and defined that

[20] "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects—Final Rule," 67 FR 80186 (December 31, 2002).

term to include pollutants regulated under certain CAA requirements, as well as "any pollutant that otherwise is subject to regulation under the [CAA]." 52.166(b)(49)(iv). EPA made clear in the preamble to the NSR Reform rule that PSD applicability was automatically updating. 67 FR at 80240.

As discussed elsewhere, it is these provisions, in conjunction with the LDVR (which subjects GHGs to regulation), that have triggered PSD applicability for GHG-emitting sources. The Tailoring Rule did not do so.

In fact, rather than establishing the requirement that PSD apply to GHG-emitting sources, the Tailoring Rule alleviated that requirement for most of the GHG-emitting sources that would otherwise be affected. The Tailoring Rule did so by providing that the only GHGs "subject to regulation" are those that are emitted by sources at or above specified thresholds (the Tailoring Rule thresholds).[21] In order to identify the thresholds, it was necessary for EPA to identify (i) the pollutant that comprises GHGs and (ii) how to account for that pollutant. However, the Tailoring Rule made clear that, on the one hand, the states may either: (a) Adopt different requirements for the thresholds, as long as those requirements were equivalent to the requirements of the thresholds promulgated by EPA; or (b) apply lower thresholds, as long as the states accompanied them with an assurance of adequate resources. Thus, had EPA never promulgated the Tailoring Rule, PSD would nevertheless apply to GHG-emitting sources; it would apply to all GHG-emitting sources at or above the 100/250-tpy threshold; and it would not be limited to GHG-emitting sources at or above the Tailoring Rule thresholds.

The SIP call that EPA is finalizing in this action is based on the failure of the SIPs to apply PSD to GHG-emitting sources, and that failure, in turn, is rooted in the failure of the SIPs to apply PSD to newly regulated pollutants on an automatically updating basis. The states' corrective SIP revision in response to the SIP call that applies PSD to GHG-emitting sources may apply the Tailoring Rule thresholds (or lower thresholds, depending, as just noted, on the state's resources), but, again, the current failure of the SIPs to include the Tailoring Rule thresholds is not the basis for the SIP call.

As a result, the process of 40 CFR 51.166(a)(6)(i), with its 3-year deadline, does not apply in place of the SIP call, as the commenter suggests. 40 CFR 51.166(a)(6)(i) provides, "Any State required to revise its implementation plan *by reason of an amendment to this section,* including any amendment adopted simultaneously with this paragraph (a)(6)(i), shall adopt and submit such plan revision to the Administrator for approval no later than three years after such amendment is published in the Federal Register." (Emphasis added.) This provision was added as part of the 2002 rulemaking revising the NSR program that we call the NSR Reform rule. *See* 67 FR 80186 (December 31, 2002). In addition, as noted already, the requirement that SIP PSD programs automatically update is a longstanding requirement, and EPA most recently reiterated that requirement, with revised terminology, in the NSR Reform rule as well. There, EPA revised the definition of major stationary source—the entity to which PSD applies—to mean a source that emits the requisite amount of "any regulated NSR pollutant," 40 CFR 51.166(b)(1)(i)(a), 67 FR at 80239–40; and EPA defined that term to include, among other things, "any air pollutant that otherwise is subject to regulation under the Act." 40 CFR 51.166(b)(49)(iv). EPA added in the preamble, "[t]he PSD program applies automatically to newly regulated NSR pollutants, which would include final promulgation of an NSPS applicable to a previously unregulated pollutant." 67 FR at 80240. After EPA promulgated the NSR Reform rule, many states submitted SIP revisions that incorporated the revised terminology, and in that manner, assured that their PSD programs automatically updated. Of course, the states subject to this SIP call have had the opportunity to submit SIP revisions since December 31, 2002—almost 8 years ago—to conform to the NSR Reform rule and thereby assure that their PSD programs are automatically updating. 67 FR at 80241. Many of the affected states did not do so, and that has led to the failure of the SIPs to apply PSD to GHGs, which is the substantial inadequacy that justifies the SIP call.

It is true that the SIP call requires a corrective SIP revision for states to apply PSD to GHG-emitting sources (and does not mandate that states revise their PSD applicability provisions to incorporate an automatic updating mechanism). In doing so, states may adopt the Tailoring Rule thresholds—including certain features such as the definition of GHGs—or may adopt differently phrased requirements or lower thresholds, as explained earlier in this preamble, but this aspect of the state's obligation does not, as commenters would have it, somehow take the requirement out of the SIP call process and place it in the 40 CFR 51.166(a)(i) process.

In addition, it is clear that the commenters are incorrect in their assertion that PSD applicability for GHGs must be delayed for the 3-year SIP submission period under 40 CFR 51.166(a)(i) and in their related assertion that EPA's efforts to apply the Tailoring Rule amount to unlawful retroactive application of regulatory requirements. The 3–year period does not apply to this requirement that PSD apply to GHG-emitting sources, as discussed earlier in this preamble; even more, by operation of the CAA, in conjunction with the LDVR, PSD applies to GHGs beginning on January 2, 2011, with or without the Tailoring Rule. Again, the Tailoring Rule simply adds thresholds to limit that applicability.[22]

For similar reasons, commenters are also incorrect in arguing that CAA section 110(a)(1), which requires a SIP submittal "within 3 years (or such shorter period as the Administrator may prescribe)," supports a 3-year period for the SIPs required under the SIP call and precludes PSD applicability during that period. Nothing in that provision overrides the operation of the CAA provisions, discussed elsewhere, which automatically apply PSD to newly regulated pollutants, and EPA's regulations that codify those provisions, in conjunction with the LDVR, to mean that GHG-emitting sources are subject to PSD as of January 2, 2011. Moreover, this provision cannot override the SIP call provisions, which apply for reasons stated elsewhere. In any event, this provision does not mandate a 3-year period for SIP submittal; rather, the provision, by its terms, authorizes EPA to prescribe a shorter period.

Another commenter is mistaken in making the somewhat similar assertion that "with regard to the SIP revisions required to accommodate any new regulated pollutant under the PSD program Section 166(b) of the Act allows the States 21 months. Any SIP

[21] More broadly, the Tailoring Rule indicated that the Tailoring Rule thresholds could be treated as incorporated in any of several of the components of the regulatory definition of "major stationary source." 75 FR at 31582.

[22] Nor does any provision in 40 CFR 51.166 mandate that states adopt the Tailoring Rule thresholds. Again, the Tailoring Rule thresholds are limitations on PSD applicability and are not minimum PSD requirements that states must adopt under CAA section 110(a) or the PSD provisions. Rather, a state may, if it chooses, retain the lower 100/250-tpy thresholds, apply PSD to a larger universe of GHG-emitting sources, and increase its resources for PSD permitting accordingly. Thus, the 3-year period in 40 CFR 51.166(a)(1) does not apply to the SIP revisions that adopt the Tailoring Rule thresholds.

Call before the States have failed to meet that deadline is illegally premature." The commenter is mistaken because (i) CAA section 166(b) by its terms applies only in the case of certain pollutants listed in CAA section 166(a) and pollutants for which NAAQS are promulgated and therefore does not apply to GHGs, and (ii) the D.C. Circuit held, in *Alabama Power* v. *Costle,* that the 21-month period does not toll the applicability of PSD requirements to pollutants, that is, that PSD requirements apply to pollutants during that period. 636 F.2d 323,406 (1980).

Finally, the commenter erred in asserting that in the proposed SIP call, "EPA characterized the Tailoring Rule as creating a PSD permit moratorium," that EPA has no authority to impose such a moratorium, and therefore that no such moratorium can apply in the affected states. On the contrary, neither in the proposed SIP call nor anywhere else has EPA "characterized the Tailoring Rule as creating a PSD permit moratorium." The commenter has not—nor could it—provide any citations to that effect. It is certainly true that EPA does not have authority to impose a blanket construction moratorium, and EPA has never claimed to the contrary. What EPA did say in the proposed SIP call is that GHG-emitting sources in states without authority to issue permits to those sources will face *de facto* obstacles to construction or modification. For example, EPA said that in such states, "absent further action, GHG sources that will be required to obtain a PSD permit for construction or modification on and after January 2, 2011, will be unable to obtain that permit and therefore may be unable to proceed with planned construction or modification * * *." 75 FR at 53894/3. This statement remains valid.

(III) Timing of finding of substantial inadequacy

Some industry commenters also stated that EPA "cannot make [a finding of substantial inadequacy] until the January 2, 2011, date on which PSD permitting requirements for GHGs will [first] apply." They explained that CAA section 110(k)(5) "does not describe the event of a 'substantial inadequacy' as an anticipated future occurrence, instead stating that EPA may issue a SIP call to any state with a SIP that 'is substantially inadequate' to comply with CAA requirements. The CAA does not provide EPA with a basis for * * * issu[ing] a SIP call because the agency expects to find that some states' SIP will become 'substantially inadequate' at some later time." (Emphasis in original.)

We disagree with commenters' reading of CAA section 110(k)(5). EPA is justified in finding that under CAA section 110(k)(5), each of the affected SIPs "is substantially inadequate" to comply with CAA requirements at the present time.

In brief, under each of these SIPs' current provisions, they will not apply PSD to GHG-emitting sources when, in only one month's time, those sources will be subject to PSD under the CAA. Some lead time generally is required to revise SIPs. As a result, there is a meaningful risk in each of these states that, beginning in one month's time, sources that are subject to PSD will not have a permitting authority available to process their permit applications and therefore will face delays in their construction and modification projects. This situation is not in keeping with one of the purposes of PSD, which is to protect the environment in a manner that reduces potential negative repercussions to economic growth. Consistent with that purpose, we interpret CAA section 110(k)(5) to authorize a finding at this time that the SIPs are substantially inadequate to comply with CAA requirements.

Specifically, as discussed earlier in this preamble, under the terms of the CAA PSD applicability provisions, large sources become subject to PSD as soon as the pollutants they emit become subject to regulation. CAA section 165(a)(1), 169(1). Accordingly, again as discussed earlier in this preamble, (i) the CAA requires that states assure that the PSD applicability provisions in their SIPs are automatically updating, (ii) EPA's longstanding regulations incorporate this requirement, and (iii) EPA reiterated this regulatory requirement for automatic updating in the 2002 NSR Reform rule (*see* 67 FR 80186, December 31, 2002), using different terminology, and required states to submit SIP revisions incorporating the requirement within 3 years. The requirement for automatic updating is one of the foundations for the requirement that the SIPs affected by this action apply PSD to GHG-emitting sources as of January 2, 2011.

These SIPs, under their present provisions, do not do so, and thus they will not apply PSD to GHG-emitting sources by January 2, 2011. If they do not, then no permitting authority will be available by January 2, 2011, and sources may face delays in obtaining permits to construct or modify. To assure the availability of a permitting authority, the SIPs must be revised and approved by EPA, or else a FIP must be put in place. This process requires some time, but again, until it is completed, sources face those delays.

Delays in construction or modification solely due to the lack of a permitting authority to process applications are not consonant with the purposes of the PSD provisions. One purpose of the PSD provisions is to protect public health and the environment consistent with the promotion of economic development. *See* CAA section 160. In particular, CAA section 160(3) identifies as some of the purposes of PSD, "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources."

The requirements of CAA section 110(k)(5), as they apply to PSD SIPs, should be interpreted in that light. The DC Circuit has held that the terms of the PSD provisions should be interpreted with the PSD purposes in mind, *New York* v. *EPA,* 413 F.3d 3, 23(DC Cir.), *rehearing en banc den.,* 431 F.3d 801 (2005), and the same should be true of CAA section 110(k)(5) as applied to PSD requirements. Therefore, whether a SIP "is substantially inadequate" under CAA section 110(k)(5) should be interpreted in light of the purposes of the PSD provisions, including the need to insure that economic growth will occur consistent with environmental goals.

In this light, EPA concludes that each affected SIP "is substantially inadequate" at this time because it does not apply PSD to GHG-emitting sources, and only a month remains before those sources will become subject to the requirement to obtain a permit for their GHG emissions when they construct or modify. In light of the lead time required to revise the SIP or put in place a FIP, there is a substantial risk that no permitting authority will be in place to process permit applications, which would result in delays in PSD permit issuance. As a result, it is sensible and in keeping with the purposes of the PSD provisions to issue the SIP call at this time and thereby set in motion the process to establish a permitting authority. As noted elsewhere, with this approach, almost all of the affected states will have a permitting authority in place by January 2, 2011, or soon enough thereafter that any delay will not have substantial adverse effects on sources in the state.

In contrast, under the commenter's interpretation, EPA would be obliged to wait until January 2, 2011, when PSD begins to apply to GHG-emitting sources, before EPA could require corrective action. Under that approach, it is much more likely that sources in some states would find themselves subject to delays before they could

construct or modify, a result at odds with the purposes of the PSD provisions.

b. Deadline

(i) Final Action

This action finalizes our proposal to establish for each state subject to the SIP call a deadline of 12 months from the date of the final SIP call to submit its corrective SIP revision, except that if the state informed EPA that it would not object to a specified shorter deadline—as short as 3 weeks from the date of this final action—then EPA would establish that shorter period as the SIP deadline.

This 3-week-to-12-month time deadline, although expedited, meets the CAA section 110(k)(5) requirement of a "reasonable deadline[]." The term "reasonable" as it appears in that provision is not defined. Accordingly, it should be given its everyday meaning. The dictionary definition of the word "reasonable" is "fair and sensible," "based on good sense," or "as much as is appropriate or fair." *Oxford American College Dictionary* 1138 (2d ed. 2007). Thus, a reasonable deadline is a time period that is sensible or logical, and that in turn depends on the facts and circumstances. Those facts and circumstances include (i) The SIP development and submission process, (ii) the preference of the state, and (iii) the imperative to minimize the period when sources will be subject to PSD but will not have available a PSD permitting authority to act on their permit application and therefore would be unable to construct or modify.

First, as to the SIP development process, the 12-month outside time limit is reasonable because it is consistent with the time period required for SIP revisions in at least one previous SIP call that EPA issued, the NOx SIP Call.[23] Moreover, a large number of states have indicated to EPA that they expect to submit their GHG SIP revisions within 12 months. These states include some that are the subject of today's SIP call action and others that already have PSD programs that apply to GHG-emitting sources and are submitting SIP revisions to incorporate the Tailoring Rule thresholds.[24]

At the state's election, the deadline may be shorter than 12 months. We recognize that this period is expedited in light of the time involved in most SIP development and submission processes. In particular, we recognize that some states may need to undertake full-blown rulemaking actions, which often take a long time to complete, and we acknowledge that some states may need to change their statutory provisions, which may take even longer. Even so, we believe that under the circumstances present here, states may decide that a deadline shorter than 12 months is reasonable in light of emergency or other streamlined processes that may be used to significantly expedite action. The reasonableness of the shorter deadline is further supported because as a practical matter, for the most part, the affected states were given notice as early as August 12, 2010, when the proposed SIP call was signed and posted to the web (75 FR 53907), that they would likely need to submit, on a short timeframe, a SIP revision. Thus, these states will have had some three-and-a-half months prior to the final SIP call date to have begun work on their SIP revisions. Indeed, many states have taken advantage of that time and have already begun to develop their SIP submissions, some have already submitted them in draft form for parallel processing, and some have submitted them in final form. Although this is a matter of state process, we are prepared to work with the states on our end to develop expedited methods for developing, processing, and submitting SIP revisions.

Second, the flexibility in EPA's structure for deadlines, including the opportunity for states to select shorter deadlines, is reasonable because it is based on the state's preference. This is consistent with the federalism principles that underlie the SIP call process and the SIP system as a whole. That is, in the first instance, it is to the state to whom falls the responsibility of developing pollution controls through an implementation plan. Here, the deadline for the state to submit the plan can be as long as 1 year or as little as 3 weeks, at the election of the state. In fact, almost all of the states have articulated a preference for a deadline, and among them, they are choosing—or at least not objecting to—deadlines that range from 3 weeks to 12 months. An earlier deadline under which the state must operate acts as a burden on the state, but if the state has chosen that, and thereby has declined the option of a longer deadline (*e.g.,* 12 months), then the earlier deadline should be considered reasonable.

Third, the need to give the states the opportunity to minimize the period when sources may be unable to construct or modify due to the lack of regulatory authority to act on their permit applications is an essential consideration that supports the reasonableness of EPA's schedule. A shorter period for SIP submittal means that either the state, through the SIP revision that it submits on an expedited basis in light of this tight schedule, or EPA, through a FIP, will become the permitting authority sooner and will then be able to act on permit applications and issue permits that allow new construction and modification of existing plants. As noted earlier in this preamble, the purposes of the PSD provisions include both the protection of public health and the environment as well as the promotion of economic development. *See, e.g.,* CAA section 160(3). The D.C. Circuit has held that the terms of the PSD provisions should be interpreted with these goals in mind. *New York* v. *EPA,* 413 F.3d 3, 23 (DC Cir.), *rehearing en banc den.,* 431 F.3d 801 (2005). Accordingly, determining a "reasonable deadline[]" for the submittal of a PSD SIP revision should account for the need to protect economic development, consistent with protecting clean air resources, by assuring the availability of a permitting authority to process permit applications.

(ii) Response to comments

Some industry commenters objected to this deadline on several grounds. Their first objection is that (i) EPA contends that EPA has the authority to impose a construction ban, (ii) in fact, EPA does not have that authority, but (iii) EPA is "using the phantom threat of a construction ban to intimidate states into immediately accepting GHG regulation. * * *"

We disagree with the commenters' objection. It is untrue that EPA somehow interprets the CAA to authorize EPA to apply a construction ban as a type of sanction to apply when a pollutant becomes subject to regulation, or that EPA has stated that it interprets the CAA that way. Rather, as discussed earlier in this preamble, it is by operation of the CAA provisions that as of January 2, 2011, large GHG-emitting sources will be required to obtain permits to construct or modify. If these sources are located in a state with an approved PSD program that does not apply to GHGs, then no permitting authority may be available and, as a result, the sources may face delays in undertaking construction or modification projects. EPA is not seeking to intimidate states; rather, we wish to make sure states are fully aware

[23] "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone; Rule." 63 FR 57356 (October 27, 1998).

[24] Declaration of Regina McCarthy, *Coalition for Responsible Regulation* v. *EPA,* DC Cir. No. 09–1322 (and consolidated cases) (McCarthy Declaration), Attachment 1, Tables 2–3, in the docket for this rulemaking.

of this potential for delays in their sources' ability to construct or modify, and we do wish to give states the option to allow an early FIP that will eliminate that potential for delays. As noted earlier in this preamble, some states are selecting an early SIP submittal deadline in order to allow an early FIP that will eliminate that potential, while other states are selecting a later SIP submittal deadline but are confident that their sources will not suffer damaging delays in the interim.

Commenters also state that even with a SIP call, states should be given more than 12 months to submit their corrective SIP revisions. The commenters explain that a 12-month period is "much too brief" in light of the need for notice and comment at the state level in developing a SIP revision. Some commenters claim that the "'default' timeframe for allowing states to revise their SIPs due to a 'substantial inadequacy' with the SIPs' ability to maintain NAAQS for a conventional pollutant is 18 months." Some commenters state that "[b]ased on EPA's SIP call precedent, a development period of up to three years would be appropriate." Commenters also note that the legality of various aspects of the Tailoring Rule, including the revisions made by that rule to 40 CFR 51.166, has been challenged in the U.S. Court of Appeals for the DC Circuit, and the outcome of that litigation will not be known for some time. In such a setting, commenters state, even a December 2011 SIP call deadline would be inconsistent with CAA section 110(k)(5) by not affording states a "reasonable" time to accomplish all that they would need to do in order to address the Tailoring Rule requirements.

Another commenter concludes that "[i]t was EPA's choice (and EPA's legal interpretation of the CAA) to require states to regulate GHGs under the states' PSD and Title V permit programs; the agency must now give states a 'reasonable' period of time to comply free from onerous consequences if the states do not act within one month."

Other commenters also express concern that a deadline of 3 weeks cannot be considered "reasonable." One state commenter (Kentucky) observes that the 3-week deadline departs from the "normal SIP Call process" and is "impossibly aggressive for many agencies," and the commenter recommends "a later date to allow states the ability to properly and adequately prepare to implement the new standards as has been done historically with every SIP Call in the past." Another state commenter (Arkansas) notes that its standard rulemaking process is lengthy in comparison to the 3-week-to-12-month deadline EPA proposed and weighs against calling EPA's deadline reasonable.

According to a state commenter (Arkansas), "the need to keep state PSD permitting authority intact in order to act on permit applications would not be an issue but for the conglomeration of rules and timelines put into place by EPA to implement the regulation of GHG-emitting sources." Responding to the proposed SIP call, Arkansas states that it does not object to the shortest SIP deadline of 3 weeks after the SIP call, in light of the precarious position that Arkansas sources would be in without the speedy issuance of a FIP. However, state officials remark that the deadline is not a preference but instead is more aptly described as a necessity under the circumstances created by EPA.

With respect to the longer end of the schedule, as we explained earlier in this preamble, we consider the 12-month period to be adequate. We provided 12 months for the NO_X SIP Call rulemaking, and states were generally able to comply within that timeframe. Our information indicates that in virtually all cases, the affected states have begun to develop their SIP revisions already, and so far, almost all of the states are on track to submit their SIP revisions by December 1, 2011, even though many have indicated they do not object to an earlier deadline.

Specifically, EPA regional and headquarters officials have conferred extensively with state officials concerning the states' progress and plans.[25] Based on the states' 30-day letters and other communications with the states, 13 states operate PSD programs under SIPs that EPA identifies as lacking the authority to issue PSD permits for GHG emissions starting January 2, 2011. EPA expects that, of these 13 states (encompassing 15 state and local permitting agencies), 7 states (8 state and local permitting agencies) will be subject to a FIP by January 2, 2011. One state, Texas, has not indicated a preference for a SIP submittal deadline—and so will receive the default deadline of December 1, 2011—and has said that it does not intend to submit a SIP revision. EPA specifically requested of states for which we proposed the SIP call that they inform EPA of the period of time that they would accept as the deadline for submittal of their SIP revisions in response to a SIP call. *See* 75 FR at 53901. Accordingly, EPA is planning additional actions to ensure that GHG sources in Texas, as in every other state in the country, have available a permitting authority to process their permit applications as of January 2, 2011 (or, at the state's election, a short period thereafter that the state has said will not impede the ability of sources to obtain permits in a timely way).

With respect to the shorter end of the timetable, EPA recognizes commenters' concerns about the 3-week period that states may elect but considers this period reasonable, under the particular circumstances presented, as discussed earlier in this preamble, including the facts that the states still retain some discretion in selecting that period and that at this point in time, that 3-week period is what some states may need to protect their sources from the potential delays due to the lack of a permitting authority, and any longer period would expose their sources to such delays.

A commenter's suggestion that EPA grant states "a 'reasonable' period of time to comply, free from onerous consequences if the states do not act within one month," is not tenable. A longer period of time would not solve the problem that, absent the establishment of EPA or state authority to issue GHG PSD permits by January 2, 2011, some sources in some states may experience obstacles to obtaining PSD permits authorizing construction or modification activities.

As for the commenters' concerns that it is EPA's actions that have led to the timing issues, our response is that the timing issues arise because, on the one hand, the CAA requires that PSD applies to GHG-emitting sources as soon as EPA subjects GHGs to regulation, but, on the other hand, the affected states' SIPs do not automatically apply PSD to GHG-emitting sources. As a result of the lack of automatic PSD applicability in those states, no permitting authority is available to issue permits to the GHG-emitting sources until some rulemaking action—whether it is a SIP or a FIP—occurs that applies PSD to GHG-

[25] In addition, the National Association of Clean Air Agencies (NACAA) recently reviewed the 30-day letters from the states and accurately summarized them in a report, "GHG Permitting Programs Ready To Go By January 2nd" (October 28, 2010). This report is included as Attachment 3 to the McCarthy Declaration. This report can be found in the docket for this rulemaking. In a few cases, the information EPA collected is more recent than what was available to NACAA because EPA's information is based not just on the 30-day letters but also on conferring with the states. NACAA summarized its conclusions as follows: "Excepting only one, programs in all states [for which EPA proposed a SIP Call] have indicated that they will either revise their PSD rules by January 2, 2011 or very shortly thereafter, or accept a Federal Implementation Plan (FIP) that will give EPA authority to issue the GHG portion of PSD permits until state rules are revised. This provides that sources required to apply PSD controls to their GHG emissions will be able to obtain the necessary permits and avoid construction delays."

emitting sources in that state and thereby establishes a permitting authority. This timing issue does not arise in the majority of states, because their SIPs do automatically apply to GHG-emitting sources as soon as EPA subjects GHGs to regulation.

In this regard, we reiterate that EPA's actions in promulgating the LDVR, which, in conjunction with the operation of the CAA, resulted in PSD applicability for GHGs, were fully consistent with the CAA. In addition, EPA has endeavored to provide as much time as possible to establish a permitting authority in the affected states by expeditiously implementing PSD applicability, including the Tailoring Rule and this rulemaking.

More specifically, with respect to the timing for the LDVR, EPA promulgated that rule by notice dated May 7, 2010, and explained the timing as follows:

> EPA is issuing these final GHG standards for light-duty vehicles as part of its efforts to expeditiously respond to the Supreme Court's nearly three year old ruling in *Massachusetts* v. *EPA,* 549 U.S. 497 (2007). In that case, the Court held that greenhouse gases fit within the definition of air pollutant in the Clean Air Act, and that EPA is therefore compelled to respond to the rulemaking petition under section 202(a) by determining whether or not emissions from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision. The Court further ruled that, in making these decisions, the EPA Administrator is required to follow the language of section 202(a) of the CAA. The Court stated that under section 202(a), "[i]f EPA makes [the endangerment and cause or contribute findings], the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant." 549 U.S. at 534. As discussed above, EPA has made the two findings on contribution and endangerment. 74 FR 66496 (December 15, 2009). Thus, EPA is required to issue standards applicable to emissions of this air pollutant from new motor vehicles.
>
> The Court properly noted that EPA retained "significant latitude" as to the "timing * * * and coordination of its regulations with those of other agencies" (*id.*). However it has now been nearly three years since the Court issued its opinion, and the time for delay has passed.

75 FR at 25402/1. EPA went on to explain other reasons why it was necessary to promulgate the LDVR at that time. *Id.* at 25402/1–2.

The LDVR, in conjunction with the operation of the CAA, resulted in the January 2, 2011, "take effect" date that is triggering PSD applicability for GHG-emitting sources. Less than one month after the LDVR, by notice dated June 3, 2010, EPA finalized the Tailoring Rule, and in that action, EPA requested states to advise EPA by letter within 60 days, or by August 2, 2010, whether their SIP PSD program applied to GHG-emitting sources. These letters helped indicate the number of states that lacked authority to apply PSD to GHG-emitting sources. Less than one month later, on September 2, 2010, EPA published the proposed SIP call and proposed FIP. EPA is now taking final action on the SIP call only 3 months after that.

As a result of EPA's expedited actions, states will have some opportunity to develop SIP revisions by, or soon after, the January 2, 2011, date. Some states began to develop their SIP revisions promptly following the SIP call proposal. As a result, they in fact are able to revise their SIPs within a very short timeframe. For example, of the states and localities for which EPA proposed the SIP call, EPA currently expects one state to have an approved SIP revision by January 2, 2011, and two more states (three local permitting agencies) to have one by February 1, 2011. Other jurisdictions have SIP development processes that generally take longer but can still be accomplished well within the 12-month period. According to these particular states, a deadline that is later than January 2, 2011, does not pose a problem because they do not expect their sources to require permits from January 2, 2011, until their deadline. We believe that taken as a group, the affected states and local agencies have selected a range of deadlines that suit their individual circumstances and, we think, that evidences the reasonableness of the deadlines we are establishing.

We note, finally, that our approach results in reasonable deadlines in light of the fact that states that select the FIP approach may immediately seek a delegation of authority to implement the FIP. Therefore, as a practical matter, there is little difference between processing GHG PSD permit applications under the authority of the state's own SIP and processing such applications under the authority of a FIP. This is because if a state were to accept delegation, the state would be required to implement EPA regulations, including EPA regulatory requirements concerning BACT, but in many cases, these EPA regulatory BACT requirements are the same as BACT requirements in the state's approved SIP. In addition, the state would inherently have a great deal of discretion in PSD permitting decisions because BACT determinations are made on a case-by-case basis that entails making judgments about a number of factors.

2. State-Specific Actions

In this section of the preamble, we summarize our basis for action for each of the states for which we are issuing a finding of substantial inadequacy and issuing a SIP call, as well as our basis for not issuing a finding or SIP call for any state for which we proposed to do so. We present a more detailed discussion in a Supplemental Information Document, which can be found in the docket for this rulemaking. The Supplemental Information Document includes all letters received from the affected states in response to our proposed action, as well as additional material that we collected and considered for this final action.

In table IV–2, "Summary of State-specific Actions in Finalizing SIP Call, by State," we identify the states and areas affected in this final rule.

TABLE IV–2—SUMMARY OF STATE-SPECIFIC ACTIONS IN FINALIZING SIP CALL, BY STATE

State (or area)	Final SIP call status	Basis for finding of substantial inadequacy	SIP submittal deadline (MM/DD/YY)
Alaska	No SIP call	Not applicable. Already made SIP submittal to EPA.	Not applicable.
Arizona: Pinal County	SIP call issued	PSD applicability provision identifies specific pollutants but does not include GHG.	12/22/10.
Arizona: Rest of State (Excludes Maricopa County, Pima County, and Indian Country).	SIP call issued	PSD applicability provision identifies specific pollutants but does not include GHG.	12/22/10.

TABLE IV–2—SUMMARY OF STATE-SPECIFIC ACTIONS IN FINALIZING SIP CALL, BY STATE—Continued

State (or area)	Final SIP call status	Basis for finding of substantial inadequacy	SIP submittal deadline (MM/DD/YY)
Arkansas	SIP call issued	PSD applicability provision incorporates by reference 40 CFR 52.21, but it does not include GHG because it does not allow automatic updating.	12/22/10.
California: Sacramento Metropolitan AQMD.	SIP call issued	PSD applicability provision identifies specific pollutants but does not include GHG.	01/31/11.
Connecticut	SIP call issued	PSD applicability provision explicitly exempts "carbon dioxide.".	03/01/11.
Florida	SIP call issued	PSD applicability provision identifies specific pollutants but does not include GHG.	12/22/10.
Idaho	SIP call issued	PSD applicability provision generally incorporates by reference 40 CFR 52.21, but it does not include GHG because it does not allow automatically updating.	12/22/10.
Kansas	SIP call issued	PSD applicability provision incorporates by reference 40 CFR 52.21, but it does not include GHG because it does not allow automatic updating.	12/22/10.
Kentucky: Louisville Metro Air Pollution Control District.	SIP call issued	PSD applicability provision incorporates by reference 40 CFR 52.21, but it does not include GHG because it does not allow automatic updating.	01/01/11.
Kentucky: Rest of State (Excludes Louisville Metro Air Pollution Control District).	SIP call issued	PSD applicability provision incorporates by reference 40 CFR 52.21, but it does not include GHG because it does not allow automatic updating.	03/31/11.
Nebraska	SIP call issued	PSD requirements lack clear authority to regulate GHG	03/01/11.
Nevada: Clark County	SIP call issued	PSD applicability provision identifies specific pollutants but does not include GHG. Local agency-effective rule recently submitted for SIP approval does not include GHG because it does not allow automatic updating.	07/01/11.
Oregon	SIP call issued	PSD applicability provision identifies specific pollutants but does not include GHG.	12/22/10.
Texas	SIP call issued	PSD applicability provision incorporates by reference 40 CFR 52.21, but it does not include GHG because it does not allow automatic updating.	12/01/11.
Wyoming	SIP call issued	State law prevents the state's regulation of GHG	12/22/10.

C. Requirements for Corrective SIP Revision

1. Application of PSD Program to GHG-Emitting Sources

Because EPA is issuing a finding of substantial inadequacy and issuing a SIP call for each state whose SIP fails to apply the PSD program to GHG-emitting sources, EPA is requiring the state to correct its SIP by submitting a SIP revision that applies PSD to GHG-emitting sources.

For those states whose PSD applicability provisions apply PSD to listed air pollutants, the state may accomplish this correction in one of at least two different ways. First, the state may revise its PSD applicability provisions so that, instead of applying PSD to sources of individually listed pollutants, the provisions apply PSD to sources that emit any "regulated NSR pollutant." We recommend that states follow this "regulated NSR pollutant" approach. It is consistent with our 2002 NSR Reform rule. *See* 67 FR at 80240.

Moreover, the "regulated NSR pollutant" approach would more readily incorporate, for state law purposes, the phase-in approach for PSD applicability to GHG sources that EPA has developed in the Tailoring Rule and may develop further through additional rulemaking. As explained in the Tailoring Rule, incorporation of this phase-in approach for state law purposes (including Steps 1 and 2 of the phase-in as promulgated in the Tailoring Rule and additional steps of the phase-in that EPA may promulgate in the future) can be most readily accomplished through state interpretation of the "subject to regulation" prong of the definition of "regulated NSR pollutant."

There are other advantages to a state that adopts EPA's definition of "regulated NSR pollutant." Doing so would resolve any issues about whether the state has authority to issue permits for sources of pollutants that EPA may subject to regulation for the first time in the future. In addition, the SIP would apply PSD to sources emitting $PM_{2.5}$.[26] Finally, state adoption of EPA's definition of "regulated NSR pollutant" would allow the SIP to mirror EPA regulations and the SIPs of most states, which would promote consistency and ease of administration. EPA's reasons for recommending that states follow the "regulated NSR pollutant" approach are explained in more detail in the proposal for this action (*see* 75 FR at 53903).

As an alternative to the "regulated NSR pollutant" approach just described, the state may retain its approach of applying PSD to sources of individually listed pollutants but submit a SIP revision that includes GHGs on that list of pollutants. If the state takes this approach, it must either incorporate the Tailoring Rule thresholds or demonstrate adequate resources to administer lower thresholds. If a state chooses this approach, we will approve the SIP revision on the basis that the revision is SIP-strengthening, as we stated in the proposal (*see* 75 FR at 53902).

One state commenter (Connecticut) stated its understanding that "a SIP-

[26] Following a 1997 review of our NAAQS for particulate matter, we promulgated NAAQS for fine particles ($PM_{2.5}$). We then designated all areas of the country as "attainment," "nonattainment," or unclassifiable for the $PM_{2.5}$ standards, which became effective in April 2005. Pursuant to the CAA, states are obliged to revise their PSD regulations to include the new $PM_{2.5}$ standards. However, some SIP PSD programs do not apply to $PM_{2.5}$-emitting sources. To effect a smooth transition, EPA allowed states to use PM_{10} as a surrogate for $PM_{2.5}$. EPA is not at present issuing a finding of substantial inadequacy under CAA section 110(k)(5) for such PSD programs.

strengthening approval is a form of limited approval that EPA uses for SIP submissions that meet only some of EPA's requirements, but for which there is no portion that may be separated out and fully approved or fully disapproved."

The commenter believes its previously SIP-approved PSD program should be fully approvable, once the state revises its regulations to include GHGs in the list of pollutants subject to its PSD program, to add applicability thresholds for GHGs, and to add GHGs to the pollutants for which a BACT review is required. This state commenter points out what it sees as a contradiction if EPA approves such a SIP revision as merely a SIP-strengthening one. The contradiction is that in our proposal, according to the commenter, EPA "specifically notes that it is limiting the SIP Call to the failure to apply PSD to GHG-emitting sources, as distinguished from finding that a SIP is substantially inadequate." The state commenter (Connecticut) strongly encourages EPA to "reconsider this distinction in approving state PSD programs and to fully approve any state program that addresses GHGs as set out in the Tailoring Rule, regardless of the format the state uses to revise its SIP."

We appreciate this comment and welcome the opportunity to clarify what we mean by a "SIP-strengthening" approval in this case. This type of approval constitutes a full approval of the SIP revision because it meets the requirements of the SIP call to submit a corrective SIP revision that applies PSD to GHG-emitting sources. In this case, there is no limited or partial approval. However, because this SIP revision otherwise leaves the PSD applicability provision as it stands and does not revise that provision to automatically update to cover any pollutant newly subject to regulation, we term our approval SIP-strengthening.

Although we recommend that the states adopt the "regulated NSR pollutant" approach, we do not require it because that approach is not necessary to correct the substantial inadequacy—which is the failure of the PSD SIP to cover GHG sources—for which we are issuing the SIP call. Rather, that substantial inadequacy may be corrected more narrowly by listing GHGs. We note that CAA section 110(k)(5) provides that "[w]henever the Administrator finds" that a SIP is substantially inadequate to meet CAA requirements, the Administrator shall require a SIP revision. This provision, by its terms—specifically, the use of the term "[w]henever"—authorizes, but does not require, EPA to make the specified finding and does not impose any time constraints. As a result, EPA has discretion in determining whether and when to make the specified finding. *See New York Public Interest Research Group* v. *Whitman,* 321 F.3d 316, 330–31 (2d Cir. 2003) (opening phrase "Whenever the Administrator makes a determination" in CAA section 502(i)(1) grants EPA "discretion whether to make a determination"); *Her Majesty the Queen in Right of Ontario* v. *EPA,* 912 F.2d 1525, 1533 (DC Cir. 1990) ("whenever" in CAA section 115(a) "impl[ied] a degree of discretion" in whether EPA had to make a finding). Accordingly, in this case, EPA is authorized to decide whether to issue the finding of substantial inadequacy on the basis of the SIP's lack of automatic updating or the narrower basis of the SIP's failure to apply PSD to GHGs. EPA chose the narrower basis because it addresses the immediate problem and because even states that do not adopt the automatic updating approach may nevertheless promptly take action to apply PSD to new pollutants and thereby avoid the problem of gaps in permitting authority. We caution, however, that in this case, if the state adopts the narrower approach of applying PSD to GHGs instead of the broader approach of applying PSD to "regulated NSR pollutants" so that the SIP will be automatically updating, then the SIP will not include the term "subject to regulation" and therefore may not include any vehicle or "hook" for the state to adopt by interpretation the current and any future steps of the phase-in approach. As a result, the state may have to adopt and submit for EPA approval additional SIP revisions to incorporate the current and future steps of the phase-in approach.

For those states whose PSD applicability provisions apply PSD to regulated NSR pollutants, but whose SIPs or other state law limit that applicability to pollutants subject to regulation at or about the time the SIP provision was adopted by the state, the corrective SIP revision may accomplish the correction in one of several different ways. At a minimum, the state must revise its PSD applicability provision or other state law in such a manner that PSD applies to GHGs and either incorporates the Tailoring Rule thresholds or demonstrates adequate resources to administer lower thresholds. In addition, for many of the same reasons as discussed earlier in this preamble, we recommend—but do not require—that the state revise its PSD applicability provisions or other state law in such a manner that they (i) incorporate any future refinements to the Tailoring Rule thresholds that EPA may promulgate through its phase-in approach and (ii) will apply to any other pollutant that EPA newly subjects to regulation.

2. Definition and Calculation of Amount of GHGs

In its corrective SIP revision to apply PSD to GHGs, the state must define GHGs as a single pollutant that is the aggregate of the group of six gases: CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6. As EPA stated in the Tailoring Rule, "[t]he final LDVR for GHGs specifies, in the rule's applicability provisions, the air pollutant subject to control as the aggregate group of the six GHGs * * *. Because it is this pollutant that is regulated under the LDVR, it is this pollutant to which PSD * * * appli[es]." 75 FR at 31528.

We proposed to require that the state define GHGs as just described, but we solicited comment on whether the state may adopt a different definition that is at least as stringent, and, if so, what such a definition might be. We cautioned that a definition that includes more gases than the six identified earlier in this preamble could prove to be less stringent in certain ways because such a definition could allow greater opportunities for a source of different gases to net out of PSD.

One industry commenter stated that no state should be permitted to unilaterally adopt a definition of GHG that includes more gases than set forth in the Tailoring Rule. EPA did not receive any comments on the proposed rulemaking in support of a different definition. Accordingly, EPA is finalizing this requirement as proposed.

3. Thresholds

A state, in revising its SIP to apply PSD to GHG-emitting sources, may adopt the Tailoring Rule phase-in approach into its SIP and thereby exclude sources below the Tailoring Rule thresholds. Alternatively, the state may adopt lower thresholds, but if it does so, it must show that it has "adequate personnel [and] funding * * * to carry out," that is, administer and implement, the PSD program with those lower thresholds, in accordance with CAA section 110(a)(2)(E)(i).

In the Tailoring Rule, EPA adopted a CO_2e metric and use of short tons (as opposed to metric tons) for calculating GHG emissions in order to implement the higher thresholds. 75 FR 31530, 31532. If states wish to adopt the Tailoring Rule thresholds, they are not obligated to adopt the CO_2e metric or use of short tons; however, the state

must assure that its approach is at least as stringent as under the Tailoring Rule, so that the state does not exclude more sources than under the Tailoring Rule. In addition, as noted earlier in this preamble, a state retains the authority to adopt lower thresholds than in the Tailoring Rule, but if it does, it must demonstrate that it has adequate resources.

D. Response to Procedural and Other Comments

1. Approved SIP PSD Programs That Apply to GHG Sources

Commenters state that, "[b]ased on its proposed rules, EPA has not fully considered the effect of its recent rulemakings on states and other jurisdictions that have indicated the 100 tpy CO_2e and 250 tpy CO_2e thresholds apply to determine if GHGs trigger PSD under their SIP rules." The commenters emphasize that "more than a dozen agencies implementing CAA permitting requirements will need to revise their regulations to incorporate EPA's tailored thresholds for GHGs and may be unable to do so before the Tailoring Rule's January 2, 2011, effective date. After that, these agencies could each be potentially overwhelmed by permit applications from many newly-covered emissions sources, essentially halting construction within the agencies' jurisdictions." The commenters observe that "[t]he Proposed SIP Call and Proposed FIP fail to discuss the economic consequences of this problem of the lower thresholds or to acknowledge that EPA has created this situation in the first instance." The commenters state that "EPA should be focused on addressing this problem rather than the comparatively minor issue of whether a state that will not face this onslaught can include GHG emission limits in a few permits each year." The commenters add that states face difficult implementation issues as they incorporate the elements of the Tailoring Rule into their SIPs.

These comments have no legal relevance to the SIP call because the states that are the focus of these commenters are not subject to the SIP call. We wish to note, however, that in fact, EPA is addressing expeditiously and comprehensively precisely the problems identified by the commenters. When EPA proposed the Tailoring Rule, EPA recognized and discussed at length these problems, that is, the fact that absent further action, in states with approved PSD programs that apply to GHG-emitting sources, those sources at the 100/250-tpy thresholds would be required to obtain preconstruction permits. We identified the problems that would result. We proposed to address the federal law element of this problem by narrowing our approval of those SIP PSD programs to only the part of them that applied to GHG-emitting sources at or above the Tailoring Rule thresholds. 74 FR at 55340–44.

Moreover, in the final Tailoring Rule, we remained mindful of this problem. We noted that, on the basis of teleconferences with states, we had decided to fashion the regulatory changes to implement the Tailoring Rule in a manner that would expedite state adoption of the Tailoring Rule thresholds. 75 FR at 31580–81. In addition, we asked states to tell us in letters to be submitted within 60 days after the Tailoring Rule how they planned to implement GHG permitting requirements and the Tailoring Rule, and we decided to delay final action on our proposal to narrow previous SIP approvals until we heard from the states. 75 FR at 31582. Having received and reviewed the states' responses, we intend to finalize the proposal in the Tailoring Rule to narrow EPA approval by January 2, 2011. That rule will assure that sources below the Tailoring Rule thresholds will not be subject to a *Federal* law requirement to obtain PSD permits due to their GHG emissions.

Finally, we have worked closely with the states on this issue. We have encouraged them to interpret, when possible, their PSD applicability provisions to include the Tailoring Rule thresholds, so that no further action on their part is necessary, and a significant number of states are able to do so. In addition, we have encouraged the states that need to revise their laws to incorporate the Tailoring Rule thresholds to do so as quickly as possible, so that as of January 2, 2011, or as soon as possible thereafter, sources below the Tailoring Rule thresholds will not be subject to a *state* law requirement to obtain PSD permits due to their GHG emissions. A large number of states have indicated that they will be able to take that step by January 2, 2011, on at least an emergency basis. Accordingly, we are in fact addressing quickly and comprehensively the problems presented by the fact that, absent further action, sources of GHGs below the Tailoring Rule thresholds may trigger PSD requirements as of January 2, 2011.[27]

2. Opportunity for Notice and Comment

Some industry commenters objected that because EPA provided "lengthy requests" for information to states for which it proposed the SIP call, and stated that it would use this information to determine which states should receive a SIP call, commenters would not have an opportunity to comment on that information, even though EPA would be relying on it for the basis of its final action. Commenters stated, "EPA is using the proposed rule to create the analysis to eventually support its SIP call," which is "inconsistent with both Section 307(d) procedures and the Administrative Procedure Act."

We disagree with the commenters. In the proposed rulemaking, EPA proposed to find that, as a legal matter, the PSD applicability provisions in the SIPs for 13 states did not apply to GHG-emitting sources, and EPA provided citations to, and discussion of, each affected state's SIP or other relevant state law provision, as well as the views of each state on the issue. This was adequate notice to give commenters the opportunity to comment. EPA solicited as much information as possible about each state's laws so that the final action would be fully in accordance with state law, and it is certainly conceivable that EPA might receive information that would form part of the basis of its final action. Indeed, that is the very purpose of notice-and-comment rulemaking. Even so, it is well established that the mere fact that EPA solicited comment and could receive some information that would form part of the basis of the final action does not mandate another round of notice-and-comment; otherwise, agencies would find themselves caught up in continual do-loops of notice-and-comment, with each comment period

[27] Commenters add that a similar problem arises under title V, that is, that in a number of states, absent further action, large numbers of small sources will become subject to title V for the first time on account of their GHG emissions. The commenters conclude, "[t]his further shows why it is both puzzling and troubling that EPA would consider a state's inability to issue a few permits with GHG limits in the first 6 months of 2011 a 'substantial inadequacy.'" EPA is also moving to address the title V issue commenters raise. EPA does not agree that deciding whether failure of the affected states' SIPs to apply PSD to GHG-emitting sources constitutes a substantial inadequacy depends on the relative importance of the problem represented by that failure compared with the importance of the problem represented by the need for states to incorporate the Tailoring Rule thresholds into their title V programs (which in any event are generally not SIP-related). For reasons discussed elsewhere in this preamble, the failure of the SIPs to apply PSD to GHG-emitting sources constitutes a substantial inadequacy to meet a CAA requirement under CAA section 110(k)(5), regardless of how it may stack up against other problems that EPA and the states may face in implementation of the CAA. Moreover, for the reasons noted here, the commenters' assertion that the scope of the problem represented by the affected states' failure to apply PSD to GHG-emitting sources is limited to "a few permits with GHG limits in the first 6 months of 2011" underestimates the number of permits involved.

yielding information that, as commenters would have it, would necessitate yet another comment period.

Commenters state that "[r]emarkably, EPA states that it will also directly promulgate a SIP call and FIP for any states it has inadvertently omitted from its notice of proposed rulemaking." Although the commenters do not elaborate upon this statement, they seem to imply that for EPA to finalize a finding of substantial inadequacy and a SIP call for such states would be improper because we did not provide adequate notice and opportunity for comment.

We disagree with the commenters. In the proposal, EPA listed in the "presumptive adequacy list" the states with approved SIP PSD programs for which EPA was not proposing a finding of substantial inadequacy and a SIP call, and we included citations to the relevant SIP provisions, but we went on to specifically solicit comment on whether each of those states merited a finding and SIP call. Moreover, EPA generally described the circumstances under which those states may merit a finding and SIP call. As a result, commenters had adequate notice that EPA could ultimately finalize a finding and SIP call for those states, and they could have commented if they had relevant views or information. As it turns out, we are finalizing a SIP call for only one state, Wyoming, for which we solicited comment. In response to our proposal's presumption of the adequacy of the Wyoming SIP with respect to applying PSD requirements to GHG sources, we received comments from the state's Governor, from the state's Department of Environmental Quality, and from industry and environmental commenters. Our proposal clearly provided adequate notice to these stakeholders so they could provide comment.[28]

3. Federal Implementation Plan

Some comments address the timing and other aspects of the FIP. Those comments are not relevant to this rule; therefore, EPA will not discuss them here but will discuss them in the final FIP rulemaking.

V. SIP Submittals

A. EPA Action: Findings of Failure To Submit and Promulgation of FIPs; Process for Action on Submitted SIPs

1. Actions on SIP Submittals

For any of the 13 states subject to this action, if the state submits the required SIP revision by its submittal deadline, then EPA will not issue a finding of failure to submit or promulgate a FIP. Instead, EPA will take action on the SIP submittal as quickly as possible.

Because PSD applicability for certain GHG sources begins January 2, 2011, even states with proposed SIP revisions will not be able to issue federally approved PSD permits for construction or modification to affected sources until those revisions are approved. The affected source would be able to receive a state-issued permit, but the lack of a federally approved permit means that the source would not be in accordance with federal requirements concerning its GHG emissions if it constructed or modified. In light of this potential for burden on the affected sources, we intend to act on any SIP submittals that we receive as promptly as possible.

One key opportunity to expedite approval is that we will parallel-process the SIP submittal upon request of the state. Under this approach, the state sends us the draft of the SIP revision on which it plans to seek public comment at the state level, in accordance with CAA section 110(a)(2), and the state publishes its proposed approval of that draft SIP revision. While the state is taking public comment on its proposed SIP revision, we will initiate a separate public proceeding on our proposed approval of the SIP revision at the federal level. If, subsequently, the SIP revision that the state adopts and submits to EPA is substantially similar to the draft on which EPA solicited comment, then EPA will proceed to take final action on the SIP submittal and will not re-notice it for public comment. EPA has successfully employed the parallel-processing approach in past rulemakings, and we believe that employing it in this process could significantly shorten the time EPA needs to act on the SIP revision. Several states have already submitted drafts of their GHG-related SIP revisions for parallel processing and EPA has already proposed to approve those SIP revisions. These states include Alabama, Kentucky, Tennessee, North Carolina, and Mississippi.[29]

2. Findings of Failure To Submit and Promulgation of FIPs

If the state does not meet its SIP submittal deadline, we intend to immediately issue a finding of failure to submit a required SIP submission under CAA section 110(c)(1)(A) and intend to immediately thereafter issue a FIP. This timing for FIP promulgation is authorized under CAA section 110(c)(1), which authorizes us to promulgate a FIP "at any time within 2 years after" finding a failure to submit a required SIP submission.

3. Rescission of the FIP

After we have promulgated a FIP, it must remain in place until the state submits a SIP revision and we approve that SIP revision. CAA section 110(c)(1). Under the present circumstances, we will act on a SIP revision to apply the PSD program to GHG sources as quickly as possible and, upon request of the state, will parallel-process the SIP submittal in the manner described earlier in this preamble. If we approve such a SIP revision, we will, at the same time, rescind the FIP. We discussed this approach in our proposed FIP rulemaking.[30]

B. Streamlining the State Process for SIP Development and Submittal

In the proposal, we recognized that the deadline we are giving states to submit their SIP revisions is expeditious, and we stated that we were prepared to work with the states to develop methods to streamline the state administrative process, although we recognized that the states remain fully in charge of their own state processes. We solicited recommendations during the comment period for ways that the states and we may streamline the state process for adopting and submitting these SIPs and to streamline or simplify what is required for the SIP submittal.

In the proposal, we noted as an example of possible streamlining the process as it concerns public hearing requirements. Many states require that the underlying state regulation that the state intends to develop into the SIP submittal undergo a public hearing. In addition, the CAA requires that the state provide a public hearing on the proposed SIP submittal, under CAA section 110(a)(2). In the proposal, EPA

[28] In addition, commenters are mistaken in assuming that the reason why we did not propose to issue the SIP call for Wyoming was an "inadvertent[]" omission. We proposed or solicited comment based on the information available at the time.

[29] Some commenters objected to, and others supported, parallel processing. We discuss those comments in the Supplemental Information Document, although we note that those comments are not relevant to any legal issues in this rulemaking.

[30] Proposed rule, "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan." 75 FR 53883 (September 2, 2010). The notice can be found in the docket for this rulemaking, at Document ID No. EPA–HQ–OAR–2010–0107–0045.

solicited public comment on whether it may, consistent with the CAA, accept the public hearing that the state holds on the underlying regulation as meeting the requirement for the hearing on the SIP submittal, as long as the state provides adequate public notice of the hearing. If so, EPA will not require a separate SIP hearing.

Two state commenters (Arkansas and Connecticut) favor this approach. One commenter (Connecticut) notes that because of the similarity in the required minimum public participation procedures, it has used this approach in the past and understands that it will significantly shorten the length of both its regulatory and SIP processing. The state commenter added that, in cases where it adopted a similar public hearing streamlining process as being proposed by EPA, it has been careful to provide adequate published notice concerning both the SIP revision and state regulatory adoption aspects of its public hearings and has thus avoided unnecessary time and expenses incurred in published notices, waiting for comments, and holding public hearings.

We appreciate the commenters' observations. A state meets its CAA requirements as long as it holds a hearing on the SIP revision and gives adequate notice of that hearing. EPA believes that, under the CAA, the state has discretion to combine any other hearing required at the state level—including a hearing on the state law provision—with the hearing on the SIP revision and, again, as long as the state provides adequate notice of that hearing, the state will meet CAA requirements in this regard. Because of the self-evident efficiencies in combining those types of hearings, we continue to encourage states to consider this approach.

C. Primacy of the SIP Process

We reiterate, as we stated in the proposal, that this action is secondary to our overarching goal, which is to assure that in every instance, it will be the state that will be the permitting authority. EPA continues to recognize that the states are best suited to the task of permitting because the states and their sources have experience working together in the state PSD program to process permit applications. EPA seeks to remain solely in its primary role of providing guidance and acting as a resource for the states as they make the various required permitting decisions for GHG emissions.

Accordingly, we have continued to work closely with the states to help them promptly develop and submit to us their corrective SIP revisions that extend their PSD program to GHG-emitting sources. Some of the states have submitted drafts of their SIP revisions for parallel processing, and some have submitted their adopted SIP revisions for approval. We will act promptly on their SIP submittals and we have already proposed to approve some of the SIP submittals. Again, EPA's goal is to have each and every affected state have in place the necessary permitting authorities by the time businesses seeking construction permits need to have their applications processed and the permits issued—and to achieve that outcome by means of engaging with the states directly through a concerted process of consultation and support.

EPA is taking up the additional task of issuing this SIP call and preparing to finalize, as necessary, the FIP action only because the Agency believes it is compelled to do so by the need to assure businesses, to the maximum extent possible and as promptly as possible, that a permitting authority is available to process PSD permit applications for GHG-emitting sources once they become subject to PSD requirements on January 2, 2011.

In order to provide that assurance, we are obligated to recognize, as both states and the regulated community already do, that there may be circumstances in which states are simply unable to develop and submit those SIP revisions by January 2, 2011, or for some period of time beyond that date. As a result, absent further action by EPA, those states' affected sources confront the risk that they may have to put on hold their plans to construct or modify, a risk that may have adverse consequences for the economy.

Given these exigent circumstances, EPA is proceeding with this plan, within the limits of our power, with the intent to make a back-up permitting authority available—and to send a signal of assurance expeditiously in order to reduce uncertainty and thus facilitate businesses' planning. Within the design of the CAA, it is EPA that must fill that role of back-up permitting authority. This SIP call action and the associated FIP action fulfill the CAA requirements to establish EPA in that role.

At the same time, we take these actions with the intent that states retain as much discretion as possible. In this rulemaking, we have authorized states to choose the deadline they consider reasonable for submission of their corrective SIP revision. If, under CAA requirements, we are compelled to promulgate a FIP, we invite the affected state to accept a delegation of authority to implement that FIP, so that it will still be the state that processes the permit applications, although operating under federal law. In addition, if we are compelled to issue a FIP, we intend to continue to work closely with the state to assist it in developing and submitting for approval its corrective SIP revision, so as to minimize the amount of time that the FIP must remain in place.

It is clear from the responses states made to our request in the proposal to advise us concerning the appropriate deadline for SIP submittal, and also from states' comments on the proposal, that officials in many states recognize the need for our SIP call and FIP actions, that is, that a short-term FIP may be necessary in their states to establish permitting authority to construct and modify in accordance with environmental safeguards for these sources. In addition, some states (Kansas; Arizona's Pinal County) have already indicated in their responses that they will accept delegation of the permitting responsibilities.

D. Effective Date

This rule is effective immediately upon publication in the **Federal Register.** Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. 553(d), generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register.** However, APA section 553(d)(3) provides an exception when the agency finds good cause exists for a rule to take effect in less than 30 days.

We find good cause exists here to make this rule effective upon publication because implementing a 30-day delayed effective date would interfere with the Agency's ability to ensure that, as of January 2, 2011, there is a permitting authority authorized to issue certain major stationary sources in the affected states the required PSD permits for GHG emissions. A 30-day delay in the effective date of this rule will impede implementation of this rule and create regulatory confusion. This rule establishes, for each affected state, a date by which the state must submit a corrective SIP revision; after that date, EPA may issue a FIP. This rule sets that deadline for some states as December 22, 2010, and this rule states that if a state does not meet that deadline, EPA will issue a finding of failure to submit a required SIP revision and issue a FIP on December 23, 2010. This will allow the FIP to be published and become effective by the January 2, 2011, date that PSD will first apply to GHG-emitting sources under the CAA. It is unclear whether EPA could impose these deadlines if this rule had a 30-day effective date, resulting in confusion

about when the deadlines would take effect. Plus, if EPA could not impose those deadlines, for whatever reason, then, as of January 2, 2011, certain major stationary sources in the affected states would be required to obtain PSD permits for GHG emissions that no permitting authority would be authorized to issue. Thus it would be impractical to wait 30 days to provide a regulatory mechanism to avoid the confusion that could result if this rule is not effective upon publication. Moreover, EPA finds that it is necessary to make this rule effective upon publication to avoid any economic harm that the public and the regulated industry might incur if there is no permitting authority able to issue PSD permits for GHG emissions on January 2, 2011.

The purpose of the APA's 30-day effective date provision is to give affected parties time to adjust their behavior before the final rule takes effect. The states for which the rule sets short deadlines have each indicated in comment letters to EPA that they do not object to those deadlines; states with longer deadlines will, in fact, have more than 30 days to react to this rule. Both the states and the public have been aware of this impending final rule for some time, as it was made available to the public on August 12, 2010, even before its September 2, 2010, publication date in the **Federal Register,** and the public was afforded the opportunity to comment on the proposal. 75 FR 53892. The public has also been aware of the timeline for this action, since the proposed rule stated that the rule would be finalized on December 1, 2010, and that it may set dates for state action as early as December 22, 2010. *See* 75 FR 53892, 53896.

In addition, this rule is not a major rule under the Congressional Review Act (CRA). Thus, the 60-day delay in effective date required for major rules under the CRA does not apply.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. However, OMB has previously approved the information collection requirements contained in the existing regulations for PSD (*see, e.g.,* 40 CFR 52.21) and title V (*see* 40 CFR parts 70 and 71) under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0003 and OMB control number 2060–0336 respectively. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (*see* 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will affect states and will not, in and of itself, directly affect sources. In addition, although this rule could lead to federal permitting requirements for certain sources, those sources are large emitters of GHGs and tend to be large sources. This final rule will not impose any requirements on small entities.

D. Unfunded Mandates Reform Act

This rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. The action may impose a duty on certain state, local or tribal governments to meet their existing obligation for PSD SIP submittal, but with lesser expenditures. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. EPA refers to the definition of a small governmental jurisdiction that the Regulatory Flexibility Act uses, which is a government of a city, county, town, school district, or special district with a population of less than 50,000. Thus, this rule only applies to large state and local permitting programs and not to small governments.

E. Executive Order 13132—Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action merely prescribes EPA's action for states that do not meet their existing obligation for PSD SIP submittal. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicited comment on the proposal for this action from state and local officials.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). In this action, EPA is not addressing any tribal implementation plans. This action is limited to states that do not meet their existing obligation for PSD SIP submittal. Thus, Executive Order 13175 does not apply to this action.

Although Executive Order 13175 does not apply to this final rule, EPA specifically solicited additional comment on the proposal for this action from tribal officials and we received one comment from a tribal agency. Additionally, EPA participated in a conference call on July 29, 2010, with the National Tribal Air Association (NTAA).

G. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it merely prescribes EPA's action for states that do not meet their existing obligation for PSD SIP submittal.

H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action merely prescribes EPA's action for states that do not meet their existing obligation for PSD SIP submittal.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the U.S.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low income populations because it does not affect the level of protection provided to human health or the environment. This rule merely prescribes EPA's action for states that do not meet their existing obligation for PSD SIP submittal.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action does not constitute a "major rule" as defined by 5 U.S.C. 804(2). Therefore, this action will be effective December 13, 2010.

VII. Judicial Review

Under section 307(b)(1) of the Act, judicial review of this final action is available by filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by February 11, 2011. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Under section 307(b)(2) of the Act, the requirements of this final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

VIII. Statutory Authority

The statutory authority for this action is provided by sections 101, 111, 114, 116, and 301 of the CAA as amended (42 U.S.C. 7401, 7411, 7414, 7416, and 7601).

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Carbon monoxide, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Incorporation by reference, Intergovernmental relations, Lead, Methane, Nitrogen dioxide, Nitrous oxide, Ozone, Particulate matter, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride, Sulfur oxides, Volatile organic compounds.

Dated: December 1, 2010.

Lisa P. Jackson,

Administrator.

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