

under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

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

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

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

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

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

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

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

#### Statutory Authority

The statutory authority for this action is provided by Section 110 of the CAA, as amended (42 U.S.C. 7410).

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

Environmental protection, Air pollution control, Intergovernmental relations, Ozone.

Dated: March 23, 2011.

**Karl Brooks,**

*Regional Administrator, Region 7.*

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#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 52

[EPA-R07-OAR-2011-0310; FRL-9287-8]

#### Approval and Promulgation of Implementation Plans; State of Nebraska

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve the State Implementation Plan (SIP) submittal from the state of Nebraska addressing the requirements of Clean Air Act (CAA) sections 110(a)(1) and (2) for the 1997 revisions to the National Ambient Air Quality Standards (NAAQS) for ozone. Section 110(a)(1) requires that each state adopt and submit a SIP to support implementation of each new or revised NAAQS promulgated by the EPA and these SIPs are commonly referred to as "infrastructure" SIPs. EPA believes that Nebraska's infrastructure SIP adequately addresses the elements described in section 110(a)(2) and further described in the October 2, 2007 guidance for infrastructure SIPs issued by the EPA Office of Air Quality Planning and Standards. However, because EPA already approved the portion of Nebraska's SIP submittal relating to the interstate transport infrastructure element, section 110(a)(2)(D)(i), this proposed rulemaking does not address the interstate transport element, nor does this proposal reopen any aspect of EPA's prior action on the interstate transport element. Furthermore, this action does not address infrastructure requirements with respect to the 1997 PM<sub>2.5</sub> NAAQS or the 2006 revisions to the NAAQS. Those requirements will be addressed in future rulemaking.

**DATES:** Comments must be received on or before April 29, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R07-OAR-2011-0310 by one of the following methods:

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

2. *E-mail:* [kramer.elizabeth@epa.gov](mailto:kramer.elizabeth@epa.gov).

3. *Mail:* Ms. Elizabeth Kramer, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, Air and Waste Management Division, 901 North 5th Street, Kansas City, Kansas 66101.

4. *Hand Delivery or Courier:* Deliver your comments to Ms. Elizabeth Kramer, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, Air and Waste Management Division, 901 North 5th Street, Kansas City, Kansas 66101.

*Instructions:* Direct your comments to Docket ID No. EPA-R07-OAR-2011-0310. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information

claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through <http://www.regulations.gov> or e-mail information that you consider to be CBI or otherwise protected. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and should be free of any defects or viruses.

*Docket:* All documents in the electronic docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, i.e., 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, Region 7, 901 North 5th Street, Kansas City, Kansas 66101, from 8 a.m. until 4:30 p.m., Monday through Friday, excluding legal holidays. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

#### FOR FURTHER INFORMATION CONTACT:

Ms. Elizabeth Kramer, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101; *telephone number:* (913) 551-7186; *fax number:* (913) 551-7844; *e-mail address:* [kramer.elizabeth@epa.gov](mailto:kramer.elizabeth@epa.gov).

#### SUPPLEMENTARY INFORMATION:

Throughout this document whenever "we," "us," or "our" is used, we refer to EPA. This section provides additional

information by addressing the following questions:

- I. What is a section 110(a)(1) and (2) infrastructure SIP?
- II. What elements are applicable under section 110(a)(1) and (2)?
- III. What is EPA's evaluation of how the state addressed the relevant elements of section 110(a)(1) and (2)?
- IV. What action is EPA proposing?
- V. Statutory and Executive Order Reviews

### **I. What is a section 110(a)(1) and (2) infrastructure SIP?**

Section 110(a)(1) and (2) of the CAA require, in part, that states submit to EPA plans to implement, maintain and enforce each of the NAAQS promulgated by EPA. These provisions require states to address basic SIP requirements including, for example, adequate provisions for emission inventory development, monitoring, and modeling to assure attainment and maintenance of the applicable standards. By statute, SIPs meeting the requirements of section 110(a)(1) and (2) are to be submitted by States within three years after promulgation of a new or revised standard. These SIPs are commonly referred to as "infrastructure" SIPs.

### **II. What elements are applicable under section 110(a)(1) and (2)?**

On October 2, 2007, EPA issued guidance to address infrastructure SIP elements required under section 110(a)(1) and (2) for the 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS.<sup>1</sup> EPA will address these elements below under the following headings: (A) Emission limits and other control measures; (B) Ambient air quality monitoring/data system; (C) Program for enforcement of control measures (PSD, New Source Review for nonattainment areas, and construction and modification of all stationary sources); (D) Interstate and international transport; (E) Adequate authority, resources, implementation, and oversight; (F) Stationary source monitoring system; (G) Emergency authority; (H) Future SIP revisions; (I) Nonattainment areas;<sup>2</sup> (J) Consultation with government officials, public notification, prevention of significant deterioration (PSD), and

visibility protection;<sup>3</sup> (K) Air quality and modeling/data; (L) Permitting fees; and (M) Consultation/participation by affected local entities.<sup>4</sup>

### **III. What is EPA's evaluation of how the state addressed the relevant elements of section 110(a)(1) and (2)?**

On July 18, 1997, EPA promulgated new 8-hour ozone and new fine particulate matter primary and secondary NAAQS. (62 FR 38894; 62 FR 38711). On December 7, 2007, EPA Region 7 received the state of Nebraska's ozone infrastructure SIP submittal. EPA has reviewed the state's formal submission and the relevant statutory and regulatory authorities and provisions generally referenced in the submittal from Nebraska.

As described below, today's proposed action only pertains to the 1997 ozone standard; it does not pertain to EPA's 1997 promulgation of the PM<sub>2.5</sub> standards. In addition, it does not address issues relating to interstate transport under section 110(a)(2)(D)(i), which have already been addressed for the 1997 ozone and PM<sub>2.5</sub> NAAQS in prior rulemaking (72 FR 71245).

Nebraska's SIP submittal addresses the provisions of section 110(a)(1) and (2) as described below. EPA believes that Nebraska has the adequate infrastructure needed to address all applicable elements of section 110(a)(1) and (2) for the 1997 8-hour ozone NAAQS.

(A) *Emission limits and other control measures:* Section 110(a)(2)(A) requires SIPs to include enforceable emission limits and other control measures, means or techniques, schedules for compliance and other related matters as needed to implement, maintain and enforce each NAAQS.

The state of Nebraska's statutes and Air Quality Regulations authorize the Nebraska Department of Environmental Quality (NDEQ) to regulate air quality and implement air quality control regulations. Section 81–1504 of the Nebraska Revised Statutes authorizes NDEQ to act, among other things, as the state air pollution control agency for all purposes of the CAA and to develop comprehensive programs for the prevention, control and abatement of new or existing pollution to the air of the state. Air pollution is defined in

Section 81–1502 of the Nebraska Revised Statutes as the presence in the outdoor atmosphere of one or more air contaminants or combinations thereof in such quantities and of such duration as are or may tend to be injurious to human, plant, or animal life, property, or the conduct of business.

Section 81–1505(1) of the Nebraska Revised Statutes authorizes the Nebraska Environmental Quality Council (EQC) to adopt and promulgate rules which set air standards that will protect public health and welfare. The EQC is also authorized to classify air contaminant sources according to levels and types of discharges, emissions or other characteristics.

Chapter 4, Section 005 of Title 129 of the Nebraska Administrative Code (NAC) ("Ambient Air Quality Standards") adopts the 1997 ozone standards promulgated by EPA (*i.e.*, 0.08 parts per million). In addition, the Nebraska rules incorporate, by reference, Appendix I in 40 CFR Part 50 for determining whether the ozone standards have been attained. Therefore, ozone is an air contaminant which may be regulated under Nebraska law.

EPA notes that Chapter 35, Section 001 of the NAC provides that sources may submit information relating to excess emissions during a startup, shutdown or malfunction (SSM) events. Nevertheless, notwithstanding this provision, the regulations expressly give the Director of NDEQ the ability to take appropriate enforcement action. See chapter 35, Sections 001, 006, and 008 of the NAC. In today's proposed rulemaking, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during a SSM of operations at a facility. EPA believes that a number of states have SSM provisions that are contrary to the Clean Air Act and existing EPA guidance,<sup>5</sup> and the Agency plans to address such state regulations in the future. In the meantime, EPA encourages any state having a deficient SSM provision to take steps to correct it as soon as possible.

EPA notes that the Section 81–1513 of the Nebraska Revised Statutes contain provisions that give the Director of NDEQ the authority, under certain circumstances, to grant variances from rules and regulations established

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

<sup>2</sup> As discussed in further detail below, subsection 110(a)(2)(I) is not applicable for the infrastructure SIP approval process and therefore EPA will take action on the requirements of part D attainment plans separately.

<sup>3</sup> As discussed in further detail below, subsection 110(a)(2)(J), as it relates to visibility protection, is also not applicable for the infrastructure SIP approval process, and therefore EPA is not addressing it in today's proposed rulemaking.

<sup>4</sup> This action also does not address infrastructure requirements with respect to the 1997 PM<sub>2.5</sub> NAAQS or the 2006 revisions to the NAAQS. Those requirements will be addressed in future rulemaking.

<sup>5</sup> Steven Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation. "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown." Memorandum to EPA Air Division Directors, September 20, 1999.

pursuant to the Clean Air Act.<sup>6</sup> EPA also notes that the Nebraska regulations contain provisions which allow the Director of NDEQ the discretion to approve alternatives to the Nebraska regulations (see, e.g., chapter 6, Section 004 of the NAC, which allows the Director to approve alternate test methods and procedures for use in determining actual emissions). In this action, EPA is not proposing to approve or disapprove any existing state rules with regard to such “variance” or “Director’s discretion” provisions. EPA believes that a number of states have such provisions that are contrary to the Clean Air Act and existing EPA guidance<sup>7</sup>, and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a “variance” or “Director’s discretion” provision that is contrary to the Clean Air Act and EPA guidance to take steps to correct the deficiency as soon as possible.

EPA believes that Nebraska has statutory and regulatory authority to establish additional emissions limitations and other measures, as necessary to address attainment and maintenance of the ozone standards. Therefore, EPA believes that the Nebraska SIP adequately addresses the requirements of section 110(a)(2)(A) for the 1997 8-hour ozone NAAQS.

(B) *Ambient air quality monitoring/data system*: Section 110(a)(2)(B) requires SIPs to include provisions to provide for establishment and operation of ambient air quality monitors, collection and analysis of ambient air quality data, and making these data available to EPA upon request.

To address this element, section 81–1505(12)(o) of the Nebraska Revised Statutes provides the enabling authority necessary for Nebraska to fulfill the requirements of Section 110(a)(2)(B). This provision gives the EQC the authority to promulgate rules and regulations concerning the monitoring of emissions. The Air Quality Division within NDEQ implements these requirements. Along with their other

duties, the monitoring program within NDEQ’s Air Compliance & Enforcement Program collects air monitoring data, quality assures the results, and reports the data.

NDEQ submits annual monitoring network plans to EPA for approval, including plans for its ozone monitoring network, as required by 40 CFR 58.10. Prior to submission to EPA, Nebraska makes the plans available for public review on NDEQ’s Web site. See, <http://www.deq.state.ne.us/Publica.nsf/a9f87abbcc29fa1f8625687700625436/3f5f30d938b93ef38625730800516a57?OpenDocument>, for NDEQ’s 2009 Ambient Air Monitoring Network Plan. This Plan includes, among other things, the locations for the ozone monitoring network. On February 23, 2010, EPA approved Nebraska’s 2009 ambient air network monitoring plan. According to this Plan (at page 15), NDEQ also plans to conduct five-year monitoring network assessments, including the ozone monitoring network, as required by 40 CFR 58.10(d). As mentioned previously under element (A), Title 129, Chapter 4, Section 005 of the NAC requires that attainment with the ozone standard be determined in accordance with the applicable Federal regulations in 40 CFR Part 50, App. I. Nebraska submits air quality data to EPA’s Air Quality System (AQS) quarterly, pursuant to the provisions of work plans developed in conjunction with EPA grants to the state.

Based on the foregoing, EPA believes that the Nebraska SIP meets the requirements of section 110(a)(2)(B) for the 1997 8-hour ozone NAAQS.

(C) *Program for enforcement of control measures (PSD, New Source Review for nonattainment areas, and construction and modification of all stationary sources)*: Section 110(a)(2)(C) requires states to include the following elements in the SIP: (1) A program providing for enforcement of all SIP measures described in Section 110(a)(2)(A); (2) a program for the regulation of the modification and construction of stationary sources as necessary to protect the applicable NAAQS; and (3) a permit program to meet the major source permitting requirements of the Act (including the program for areas designated as not attaining the NAAQS, and a program for the prevention of significant deterioration of air quality program in other areas). Note that all areas of Nebraska are currently in attainment with the NAAQS. In addition, as discussed in further detail below, this proposed infrastructure SIP rulemaking will not address the Nebraska program for nonattainment area-related

provisions, since these submittals are not applicable for the infrastructure SIP approval process.

(1) With respect to enforcement of requirements of the SIP, Section 81–1504(1) of the Nebraska Revised Statutes provide authority for NDEQ to enforce the requirements of the Nebraska Environmental Protection Act, and any regulations, permits, or final compliance orders issued under the provisions of that law. In addition, Section 81–1504(7) authorizes NDEQ to issue orders prohibiting or abating discharges of waste into the air and requiring the modification, extension or adoption of remedial measures to prevent, control, or abate air pollution. Section 81–1507 authorizes NDEQ to commence an enforcement action for any violations of the Environmental Protection Act, any rules or regulations promulgated thereunder, or any orders issued by NDEQ. This enforcement action can not only seek civil penalties, but also require that the recipient take corrective action to address the violation. See Section 81–1508.02. Section 81–1508.01 provides for criminal penalties for knowing or willful violations of the statute, regulations or permit conditions, in addition to other acts described in that section.

(2) Section 110(a)(2)(C) also requires that the SIP include measures to regulate construction and modification of stationary sources to protect the NAAQS. Nebraska has a program under Title 129, Chapter 17 of the NAC that requires such sources to first obtain a construction permit from NDEQ. The permitting process is designed to ensure that new and modified sources will not interfere with NAAQS attainment. NDEQ has the authority to require the source applying for the permit to undergo an air quality impact analysis. If NDEQ determines that emissions from a constructed or modified source interfere with attainment of the NAAQS, it may deny the permit until the source makes the necessary changes to obviate the objections to the permit issuance. See Chapter 17, Sections 008 and 009 of the NAC.

EPA has determined that Nebraska’s minor new source review (NSR) program adopted pursuant to section 110(a)(2)(C) of the Act regulates emissions of ozone and its precursors. EPA has also determined that certain provisions of the state’s minor NSR program adopted pursuant to section 110(a)(2)(C) of the Act likely do not meet all the requirements found in EPA’s regulations implementing that provision. See 40 CFR 51.160–51.164. EPA previously approved Nebraska’s

<sup>6</sup> The statutory variance provisions are not included in the Nebraska SIP and are not recognized under federal law. In any event, a variance from an EPA-approved SIP requirement would not be recognized as a revision to the SIP unless approved by EPA under the CAA requirements for SIP revisions (see, 40 CFR 51.104(d)).

<sup>7</sup> J. Craig Potter, Assistant Administrator for Air and Radiation, Thomas L. Adams, Jr., Assistant Administrator for Enforcement and Compliance Monitoring, and Francis S. Blake, General Counsel, Office of General Counsel. “Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency.” Memorandum, September 23, 1987. See also 52 FR 45109 (November 24, 1987).

minor NSR program into the SIP, and at the time there was no objection to the provisions of this program. See 37 FR 10842 (May 31, 1972) and 60 FR 372 (January 4, 1995). Since then, the state and EPA have relied on the existing state minor NSR program to assure that new and modified sources not captured by the major NSR permitting programs do not interfere with attainment and maintenance of the NAAQS.

In this action, EPA is proposing to approve Nebraska's infrastructure SIP for ozone with respect to the general requirement in Section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. EPA is not proposing to approve or disapprove the state's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program. EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of Section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

(3) Nebraska also has a program approved by EPA which meets the requirements of Part C, relating to prevention of significant deterioration of air quality. Nebraska's implementing rule, Title 129, Chapter 19, incorporates the relevant portions of the Federal rule, 40 CFR 52.21 (as of July 1, 2004), by reference. In this action, EPA is not proposing to approve or disapprove any state rules with regard to NSR reform requirements. EPA will act on NSR reform submittals through a separate rulemaking process. For Nebraska, we have previously approved Nebraska's NSR reform rules for attainment areas, and, as previously stated, Nebraska currently has no nonattainment areas. See 76 FR 15852, March 22, 2011.

The Nebraska SIP also contains a permitting program for major sources and modifications in nonattainment areas (see Title 129, Chapter 17, Section 013). This section is currently not applicable to Nebraska because all areas

of Nebraska are currently in attainment with the NAAQS. Even if it were applicable, the SIP's discussion of nonattainment areas is not addressed in this rulemaking (see discussion of the Section 110(a)(2)(I) requirements for nonattainment areas, below).

With respect to the PSD program, the Nebraska SIP provides that ozone precursors (volatile organic compounds—VOCs and oxides of nitrogen—NOx) are regulated. For example, a stationary source that is major for VOCs is also major for ozone, pursuant to Chapter 2, Section 005 of the NAC. In addition, a source that undergoes an emissions increase or a net emissions increase of 40 tons per year of VOCs also is considered to have undergone an emissions increase or net emissions increase of 40 tons per year of ozone under the state's prevention of significant deterioration of air quality program. See Chapter 19, Section 010.06 of the NAC. In addition, because Nebraska defines "regulated NSR pollutant" to include pollutants for which a NAAQS has been promulgated and any precursors for such pollutants that have been identified by EPA,<sup>8</sup> VOCs and NOx are therefore regulated by Nebraska as precursors for ozone.

Finally, EPA notes that on March 22, 2011, in a separate rulemaking, EPA approved the state of Nebraska's revisions to its SIP to regulate GHGs under the Nebraska New Source Review Prevention of Significant Deterioration program. 76 FR 15852. Thus, we have previously determined that the Nebraska SIP meets the PSD requirements with respect to GHGs.

On the basis of the foregoing, EPA believes that the Nebraska SIP and underlying statutory authority are adequate to meet the requirements of section 110(a)(2)(C) for the 1997 8-hour ozone NAAQS.

*(D) Interstate and international transport:* Section 110(a)(2)(D)(i) requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment in, or interfering with maintenance by, another state with respect to the NAAQS, or from interfering with measures required in another state to prevent significant deterioration of air quality or to protect visibility.

Nebraska addressed the provisions of Section 110(a)(2)(D)(i), as it relates to the 1997 ozone and PM standards, in the SIP submission received by EPA on

<sup>8</sup> The regulations at 40 CFR 52.21(b)(50) specifically state that nitrogen oxides and VOCs are considered precursors for ozone.

May 18, 2007. EPA approved the portion of the Nebraska SIP submittal relating to Section 110(a)(2)(D)(i), on December 17, 2007 (72 FR 71245). Therefore, the proposed action addressed in this notice does not include the interstate transport elements, nor does this rulemaking reopen any aspect of EPA's prior action on the transport elements for Nebraska for the 1997 standards.

Section 110(a)(2)(D)(ii) requires that the SIP insure compliance with the applicable requirements of sections 126 and 115, relating to interstate and international pollution abatement.

Section 126(a) of the Act requires new or modified sources to notify neighboring states of potential impacts from sources within the state. Although Nebraska sources have not been identified by EPA as having any interstate or international impacts under Section 126 or Section 115 in any pending actions relating to the 1997 ozone standards, the Nebraska regulations address abatement of the effects of interstate pollution. Title 129, Chapter 14, Section 010.03 of the NAC requires NDEQ, after receiving a complete PSD permit application, to notify EPA, as well as officials and agencies having cognizance where the proposed construction is to occur. This includes state or local air pollution control agencies and the chief executives of the city and county where the source would be located; any comprehensive regional land use planning agency; and any state, Federal Land Manager, or Indian governing body whose lands may be affected by emissions from the source or modification. Finally, we believe that Nebraska could use the same statutory authorities previously discussed, primarily Section 81–1505 of the Nebraska Revised Statutes, to respond to any future findings with respect to the 1997 ozone standards.

Based on the foregoing, EPA believes that Nebraska has the adequate infrastructure needed to address Section 110(a)(2)(D)(ii) for the 1997 8-hour ozone NAAQS.

*(E) Adequate authority, resources, implementation, and oversight:* Section 110(a)(2)(E) requires that SIPs provide for the following: (1) Necessary assurances that the state (and other entities within the state responsible for implementing the SIP) have adequate personnel, funding, and authority under state or local law to implement the SIP, and that there are no legal impediments to such implementation; (2) requirements that the state comply with the requirements relating to state boards, pursuant to Section 128 of the

Act; and (3) necessary assurances that the state has responsibility for implementation of any plan provision for which it relies on local governments or other entities to carry out that portion of the plan.

(1) With respect to adequate authority, we have previously discussed Nebraska's authority to implement the SIP for the 1997 ozone standards, primarily in the discussion of Section 110(a)(2)(A). Neither Nebraska nor EPA has identified any legal impediments to implementation of those standards.

With respect to adequate resources, NDEQ asserts that it has adequate personnel to implement the SIP. State statutes provide NDEQ the authority to establish bureaus, divisions and or sections to carry out the duties and powers granted by the Nebraska state law to address the control of air pollution, to be administered by full-time salaried, bureau, division or section chiefs. See Nebraska Revised Statutes Section 81–1504(14). NDEQ's Air Quality Division is currently divided into the Permitting Section, the Compliance Section, and the Program Planning and Development Unit.

With respect to funding, the Nebraska statutes require the EQC to establish various fees for sources, in order to fund the reasonable costs of implementing various air pollution control programs. For example, Section 81–1505(12)(e) of the Nebraska Revised Statutes requires the EQC to establish a requirement for sources to pay fees sufficient to pay the reasonable direct and indirect costs of developing and administering the air quality operating permit program. These costs include overhead charges for personnel, equipment, buildings and vehicles; enforcement costs; costs of emissions and ambient monitoring; and modeling analyses and demonstrations. See Nebraska Revised Statutes Section 81–1505.04(2)(b). Similarly, Section 81–1505(12)(a) requires the EQC to establish application fees for air contaminant sources seeking to obtain a permit prior to construction.

Section 81–1505.05 of the Nebraska Revised Statutes provides that all fees collected pursuant to Section 81–1505.04 be credited to the "Clean Air Title V Cash Fund" to be used solely to pay for the direct and indirect costs required to develop and administer the air quality permit program. Similarly, Section 81–1505.06 provides that all fees collected pursuant to Section 81–1505(12) be deposited in the "Air Quality Permit Cash Fund."

Nebraska uses funds in the non-Title V subaccounts, along with General Revenue funds and EPA grants under, for example, Sections 103 and 105 of the

Act, to fund the programs. EPA conducts periodic program reviews to ensure that the state has adequate resources and funding to, among others, implement the SIP.

(2) Conflict of interest provisions—Section 128

Section 110(a)(2)(E) also provides that the state must meet the requirements of Section 128, relating to representation on state boards and conflicts of interest by members of such boards. We note that this particular provision is not related to promulgation or revision of any NAAQS, and we have not determined that Nebraska must show specifically that it meets this requirement with respect to the ozone infrastructure SIP for the 1997 standards. However, the following discussion shows how Nebraska generally meets the requirements of Section 128.

Section 128 requires that a SIP-implementing body which approves permits or enforcement orders under the Act must have at least a majority of members who represent the public interest and do not derive a "significant portion" of income from entities or individuals subject to permits and enforcement orders under the Act. In addition, Section 128 requires that members of such a body or the agency head with similar authorities adequately disclose any potential conflicts of interest.

Section 81–1503 of the Nebraska Revised Statutes generally tracks the language of Section 128 of the Act. It provides guidelines on the composition of the 17 members of the Environmental Quality Council. It also requires that the Director of NDEQ (who is the person responsible for issuing permits and enforcement orders in Nebraska), before he or she enters the duty of his or her office, attest that he or she does not receive a significant portion of his or her income from permit-holders or applicants for a permit. Furthermore, Title 116 of the NAC provides the Code of Ethics for NDEQ, which includes prohibitions on conflicts of interest for all employees (including officers, employees, and directors).

(3) With respect to assurances that the state has responsibility to implement the SIP when it authorizes local or other agencies to carry out portions of the plan, Section 81–1504(18) of the Nebraska Revised Statutes grants NDEQ the authority to encourage local units of government to handle air pollution problems within their own jurisdictions. NDEQ may delegate, by contract with governmental subdivisions which have adopted air pollution control programs, the enforcement of state-adopted air

pollution control regulations within a specified region surrounding the jurisdictional area of the governmental subdivision. See Section 81–1504(23). However, the Nebraska statutes also retain authority in NDEQ to carry out the provisions of state air pollution control law. Section 81–1504(1) gives NDEQ "exclusive general supervision" of the administration and enforcement of the Nebraska Environmental Protection Act. In addition, Section 81–1504(4) designates NDEQ as the air pollution control agency for the purposes of the Clean Air Act.

The state of Nebraska relies on two local agencies for assistance in implementing portions of the air pollution control program: Lincoln/Lancaster County Health Department and Omaha Air Quality Control. NDEQ oversees the activities of these local agencies to ensure adequate implementation of the plan. NDEQ utilizes subgrants to the local agencies to provide adequate funding, and as an oversight mechanism. EPA conducts reviews of the local program activities in conjunction with its oversight of the state program. Based on the foregoing, EPA believes that Nebraska has the adequate infrastructure needed to address Section 110(a)(2)(E) for the 1997 8-hour ozone NAAQS.

(F) *Stationary source monitoring system*: Section 110(a)(2)(F) requires states to establish a system to monitor emissions from stationary sources and to submit periodic emission reports. That section also requires that the state correlate the source reports with emission limitations or standards established under the Act and make reports available for public inspection.

To address this element, Section 81–1505(12)(o) of the Nebraska Revised Statutes gives the EQC the authority to promulgate rules and regulations for air pollution control, including requirements for owner or operator testing and monitoring of emissions. It also gives the EQC the authority to promulgate similar rules and regulations for the periodic reporting of these emissions. See Section 81–1505(12)(l). Chapter 34, Section 002 of the NAC incorporates various EPA reference methods for testing source emissions, including methods for NO<sub>x</sub> and VOCs. The Federal test methods are in 40 CFR Part 60, App. A.

The Nebraska regulations also require that all Class I and Class II operating permits include requirements for monitoring of emissions. See Chapter 8, Sections 004.01 and 015 of the NAC. Furthermore, Chapter 34, Section 001 of the NAC allows NDEQ to order an emissions source to make or have tests

made to determine the rate of contaminant emissions from the source whenever NDEQ has reason to believe that the existing emissions from the source exceed the applicable emissions limits.

The Nebraska regulations also impose reporting requirements on sources subject to permitting requirements. See Chapter 6, Section 001; Chapter 8, Sections 004.03 and 015 of the NAC. Nebraska makes all monitoring reports submitted as part of Class I or Class II permit a publicly available document. Although sources can submit a claim of confidentiality for some of the information submitted, Nebraska regulations specifically exclude emissions data from being entitled to confidentiality protection. See Chapter 7, Section 004 of the NAC. Nebraska uses this information to track progress towards maintaining the NAAQS, developing control and maintenance strategies, identifying sources and general emission levels, and determining compliance with emission regulations and additional EPA requirements.

EPA believes that Nebraska has the adequate infrastructure needed to address section 110(a)(2)(F) for the 1997 8-hour ozone NAAQS.

*(G) Emergency authority:* Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health or welfare or the environment (comparable to the authorities provided in Section 303 of the Act), including contingency plans to implement the emergency authorities.

Section 81–1507 of the Nebraska Revised Statutes states that whenever the Director of NDEQ finds that an emergency exists requiring immediate action to protect the public health and welfare, he or she may issue an order requiring that such action be taken as the Director deems necessary to meet the emergency. Chapter 38, Section 003 of the NAC states that the conditions justifying the proclamation of an air pollution alert, air pollution warning, or air pollution emergency exist whenever the Director determines that the accumulation of air pollutants in any place is attaining or has attained levels which could, if such levels are sustained or exceeded, lead to a substantial threat to the health of persons. This regulation also establishes action levels for various air pollutants, including ozone. The action levels (which include “Air Pollution Alert,” “Air Pollution Warning,” and “Air Pollution Emergency”) and associated contingency measures vary depending

on the severity of the ozone concentrations. Appendix I to Title 129 of the NAC provides an Emergency Response Plan with actions to be taken under each of the severity levels. These steps are designed to prevent the excessive build-up of air pollutants to concentrations which can result in imminent and substantial danger to public health. Both the regulation at Chapter 38 and the Emergency Response Plan are contained in the federally approved SIP.

EPA believes that the Nebraska SIP adequately addresses section 110(a)(2)(G) for the 1997 8-hour ozone NAAQS.

*(H) Future SIP revisions:* Section 110(a)(2)(H) requires states to have the authority to revise their SIPs in response to changes in the NAAQS, availability of improved methods for attaining the NAAQS, or in response to an EPA finding that the SIP is substantially inadequate to attain the NAAQS.

As discussed previously, Section 81–1504 of the Nebraska Revised Statutes authorizes NDEQ to regulate air quality and implement air quality control regulations. It also authorizes NDEQ to act as the state air pollution control agency for all purposes of the Clean Air Act. Section 81–1505(1) gives the EQC the authority to adopt and promulgate rules which set air standards that will protect public health and welfare. This authority includes the authority to revise rules as necessary to respond to a revised NAAQS (see, for example, the discussion above regarding Nebraska’s adoption of the 1997 ozone NAAQS).

EPA believes that Nebraska has the adequate authority to address section 110(a)(2)(H) for the 1997 8-hour ozone NAAQS.

*(I) Nonattainment areas:* Section 110(a)(2)(I) requires that in the case of a plan or plan revision for areas designated as nonattainment areas, states must meet applicable requirements of Part D of the Act, relating to SIP requirements for designated nonattainment areas.

This section is currently not applicable to Nebraska because all areas of Nebraska are currently in attainment with the NAAQS. Nevertheless, EPA notes that the Nebraska regulations have provisions in place which address construction or modification of sources in nonattainment areas. See Chapter 17, Section 013 of the NAC. These regulations are contained in the federally approved SIP.

EPA has not addressed section 110(a)(2)(I) in its recent infrastructure SIP guidance because Part D SIPs are due on a different schedule than the infrastructure SIP submittal schedule.

(See, e.g., the infrastructure SIP guidance for the revised lead standard, 73 FR 67034, n. 113, Nov. 12, 2008, and the infrastructure SIP guidance for the revised NO<sub>2</sub> standards, 75 FR 6523, n. 27, Feb. 9, 2010.) Therefore, this proposal does not address section 110(a)(2)(I). EPA will take action on any part D nonattainment plans through a separate rulemaking.

*(J) Consultation with government officials, Public Notification, PSD and visibility protection:* Section 110(a)(2)(J) requires SIPs to meet the applicable requirements of the following CAA provisions: (1) Section 121, relating to interagency consultation regarding certain CAA requirements; (2) Section 127, relating to public notification of NAAQS exceedances and related issues; and (3) Part C of the Act, relating to prevention of significant deterioration of air quality and visibility protection.

(1) With respect to interagency consultation, Section 81–1504(3) authorizes NDEQ to advise and consult and cooperate with other Nebraska state agencies, the Federal government, other states, interstate agencies, and with affected political subdivisions, for the purpose of implementing its air pollution control responsibilities. Nebraska also has appropriate interagency consultation provisions in its preconstruction permit program. See, e.g., Chapter 14, Section 010 of the NAC (requiring NDEQ to send a copy of a notice of public comment on construction permit applications to any state or local air pollution control agency; the chief executives of the city and county in which the source would be located; any comprehensive regional land use planning agency; and any state, Federal Land Manager, or Indian governing body whose lands may be affected by emissions from the source or modification).

(2) With respect to the requirements for public notification in CAA Section 127, Chapter 38 of the NAC, discussed previously in connection with the state’s authority to address emergency episodes, contains provisions for public notification of elevated ozone and other air pollutant levels. Appendix I to Title 129 of the NAC includes measures which can be taken by the public to reduce concentrations. In addition, information regarding air pollution and related issues, is provided on an NDEQ Web site, <http://www.deq.state.ne.us/NDEQSite.nsf/AirDivSecProg?OpenView&Start=1&ExpandView&Count=500>. NDEQ also prepares an annual report on air quality in the state which is available to the public on its Web site, at <http://www.deq.state.ne.us/Publica.nsf/c4afc76e4e077e1186256877>

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(3) With respect to the applicable requirements of Part C, relating to prevention of significant deterioration of air quality and visibility protection, we previously noted in the discussion of Section 110(a)(2)(C) (relating to enforcement of control measures) how the Nebraska SIP meets the PSD requirements, incorporating the Federal rule by reference. With respect to the visibility component of Section 110(a)(2)(J), we reiterate the statutory requirement providing, in relevant part, that each plan must meet the “applicable requirements” of Part C (of Title I of the Act) relating to visibility protection. We note that the other Part C requirements specified in section 110(a)(2)(J) (applicable requirements relating to prevention of significant deterioration of air quality), specifically relate to the 1997 and 2006 NAAQS (as well as other pollutants regulated under the CAA), and a state must be able to implement those requirements with respect to a new or revised NAAQS when promulgated. In contrast to the PSD program, the visibility protection requirements are not directly related to the promulgation of, or revision to, a NAAQS. While the SIP must independently meet the visibility protection requirements of Part C by virtue of the specific SIP requirements in sections 169A and 169B of the Act, EPA believes that the visibility protection requirements are not “applicable requirements” within the meaning of section 110(a)(2)(J) and that the infrastructure SIP is not required to be revised with respect to visibility protection merely due to promulgation of, or revision to, these 1997 ozone NAAQS.

For the reasons stated above, EPA believes that Nebraska has met the applicable requirements of Section 110(a)(2)(J) for the 1997 8-hour ozone NAAQS in the state.

*(K) Air quality and modeling/data:* Section 110(a)(2)(K) requires that SIPs provide for performing air quality modeling, as prescribed by EPA, to predict effects on ambient air quality of emissions of any NAAQS pollutant, and for submission of such data to EPA upon request.

Nebraska has authority to conduct air quality modeling and report the results of such modeling to EPA. Section 81–1504(5) provides NDEQ with the authority to encourage, participate in, or conduct studies, investigations, research and demonstrations relating to air pollution and its causes and effects. As an example of regulatory authority to perform modeling for purposes of

determining NAAQS compliance, the regulations at Chapter 19, Section 019 provide for the use of EPA-approved air quality models (e.g., those found in 40 CFR Part 51, App. W) for construction permitting. If the use of these models is inappropriate, the model may be modified or an alternate model may be used with the approval of NDEQ and EPA.

The Nebraska regulations also give NDEQ the authority to require that modeling data be submitted for analysis. Chapter 19, Section 021.02 states that upon request by NDEQ, the owner or operator of a proposed source or modification must provide information on the air quality impact of the source or modification, including all meteorological and topographical data necessary to estimate such impact.

EPA believes that Nebraska has the adequate infrastructure needed to address Section 110(a)(2)(K) for the 1997 8-hour ozone NAAQS.

*(L) Permitting Fees:* Section 110(a)(2)(L) requires SIPs to require each major stationary source to pay permitting fees to the permitting authority to cover the cost of reviewing, approving, implementing and enforcing a permit. That section provides that the fee requirement applies until a fee program established by the state pursuant to Title V of the Act, relating to operating permits, is approved by EPA.

Section 81–1505 of the Nebraska Revised Statutes provides authority for NDEQ to collect permit fees, including Title V fees. For example, Section 81–1505(e) requires that the EQC establish fees sufficient to pay the reasonable direct and indirect of developing and administering the air quality permit program. Nebraska’s Title V program, including the fee program addressing the requirements of the Act and 40 CFR 70.9 relating to Title V fees, was approved by EPA on October 18, 1995 (60 FR 53872). Therefore, EPA believes that the requirements of Section 110(a)(2)(L) are met.

*(M) Consultation/participation by affected local entities:* Section 110(a)(2)(M) requires SIPs to provide for consultation and participation by local political subdivisions affected by the SIP.

Section 81–1504 of the Nebraska Revised Statutes gives NDEQ the authority to encourage local governments to handle air pollution problems within their respective jurisdictions and at the same time provide them with technical and consultative assistance. NDEQ is also authorized to delegate the enforcement of air pollution control regulations

down to governmental subdivisions which have adopted air pollution control programs. As discussed previously, NDEQ currently relies on two local agencies for assistance in implementing portions of the air pollution control program: Lincoln/Lancaster County Health Department and Omaha Air Quality Control.

In addition, as previously noted in the discussion about Section 110(a)(2)(J), Nebraska’s statutes and regulations require that NDEQ consult with local political subdivisions for the purposes of carrying out its air pollution control responsibilities.

Therefore, EPA believes that Nebraska has the adequate infrastructure needed to address Section 110(a)(2)(M) for the 1997 8-hour ozone NAAQS.

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

EPA proposes to approve the State Implementation Plan (SIP) submittal from the state of Nebraska which addresses the requirements of Clean Air Act section 110(a)(2) for the 1997 revisions to the National Ambient Air Quality Standards (NAAQS) for ozone. As described above, EPA believes that Nebraska has the required infrastructure to address all elements of section 110(a)(2) to ensure that the revised ozone standards are implemented in the state.

We are hereby soliciting comment on this proposed action. Final rulemaking will occur after consideration of any comments.

#### V. Statutory and Executive Order Reviews

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

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities



under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

#### Statutory Authority

The statutory authority for this action is provided by Section 110 of the CAA, as amended (42 U.S.C. 7410).

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

Environmental protection, Air pollution control, Intergovernmental relations, Ozone.

Dated: March 23, 2011.

Karl Brooks,

Regional Administrator, Region 7.

[FR Doc. 2011-7454 Filed 3-29-11; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R07-OAR-2011-0304 FRL-9288-1]

### Approval and Promulgation of Implementation Plans; State of Kansas

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve the State Implementation Plan (SIP) submittal from the State of Kansas addressing the requirements of Clean Air Act (CAA) sections 110(a)(1) and (2) for the 1997 revisions to the National Ambient Air Quality Standards (NAAQS) for ozone. Section 110(a)(1) requires that each state adopt and submit a SIP to support implementation of each new or revised NAAQS promulgated by the EPA and these SIPs are commonly referred to as “infrastructure” SIPs. EPA believes that Kansas’ infrastructure SIP adequately addresses the elements described in section 110(a)(2) and further described in the October 2, 2007 guidance for infrastructure SIPs issued by the EPA Office of Air Quality Planning and Standards. However, because EPA already approved the portion of Kansas’ SIP submittal relating to the interstate transport infrastructure element, section 110(a)(2)(D)(i), this proposed rulemaking does not address the interstate transport element, nor does this proposal reopen any aspect of EPA’s prior action on the interstate transport element. Furthermore, this action does not address infrastructure requirements with respect to the 1997 PM<sub>2.5</sub> NAAQS or the 2006 revisions to the NAAQS. Those requirements will be addressed in future rulemaking.

**DATES:** Comments must be received on or before April 29, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R07-OAR-2011-0304 by one of the following methods:

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

2. *E-mail:* [kramer.elizabeth@epa.gov](mailto:kramer.elizabeth@epa.gov).

3. *Mail:* Ms. Elizabeth Kramer, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, Air and Waste Management Division, 901 North 5th Street, Kansas City, Kansas 66101.

4. *Hand Delivery or Courier:* Deliver your comments to Ms. Elizabeth Kramer, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, Air and Waste Management Division, 901 North 5th Street, Kansas City, Kansas 66101.

*Instructions:* Direct your comments to Docket ID No. EPA-R07-OAR-2011-0304. EPA’s policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information

claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through <http://www.regulations.gov> or e-mail information that you consider to be CBI or otherwise protected. The <http://www.regulations.gov> Web site is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and should be free of any defects or viruses.

*Docket:* All documents in the electronic docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, i.e., 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, Region 7, 901 North 5th Street, Kansas City, Kansas 66101, from 8 a.m. until 4:30 p.m., Monday through Friday, excluding legal holidays. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

**FOR FURTHER INFORMATION CONTACT:** Ms. Elizabeth Kramer, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101; *telephone number:* (913) 551-7186; *fax number:* (913) 551-7844; *e-mail address:* [kramer.elizabeth@epa.gov](mailto:kramer.elizabeth@epa.gov).

#### SUPPLEMENTARY INFORMATION:

Throughout this document whenever “we,” “us,” or “our” is used, we refer to EPA. This section provides additional