



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R04-OAR-2012-0814; FRL-9792-2]

### **Approval and Promulgation of Implementation Plans; Region 4 States; Prong 3 of Section 110(a)(2)(D)(i) Infrastructure Requirement for the 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards**

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

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to conditionally approve submissions from Kentucky, North Carolina and Tennessee for inclusion into each State Implementation Plan (SIP). This action addresses the Clean Air Act (CAA or Act) requirements pertaining to prevention of significant deterioration (PSD) for the 1997 annual and 2006 24-hour fine particulate matter (PM<sub>2.5</sub>) National Ambient Air Quality Standards (NAAQS) infrastructure SIPs. The CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an “infrastructure” SIP. EPA is conditionally approving the submissions for Kentucky, North Carolina and Tennessee that relate to adequate provisions prohibiting emissions that interfere with any other state’s required measures to prevent significant deterioration of its air quality. All other applicable infrastructure requirements for the 1997 annual and 2006 24-hour PM<sub>2.5</sub>NAAQS associated with these States have been addressed in separate rulemakings.

**DATES:** This rule will be effective [insert 30 days after date of publication in the Federal Register].

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2012-0814. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Sean Lakeman, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9043. Mr. Lakeman can be reached via electronic mail at [lakeman.sean@epa.gov](mailto:lakeman.sean@epa.gov).

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#### **I. Background**

Upon promulgation of a new or revised NAAQS, sections 110(a)(1) and (2) of the CAA require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance for that new NAAQS. On July 18, 1997 (62 FR 38652), EPA promulgated a new annual PM<sub>2.5</sub> NAAQS and on October 17, 2006 (71 FR 61144), EPA promulgated a new 24-hour PM<sub>2.5</sub> NAAQS. On December 5, 2012, EPA proposed to conditionally approve Kentucky, North Carolina and Tennessee's submissions addressing section 110(a)(2)(D)(i)(II) related to PSD. A summary of the background for today's final action is provided below. See EPA's December 5, 2012, proposed rulemaking (77 FR 72291) for more detail.

Section 110(a) of the CAA requires states to submit SIPs to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA

for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. The data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains. In the case of the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous PM NAAQS.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for "infrastructure" SIP requirements related to a newly established or revised NAAQS. As already mentioned, these requirements include SIP infrastructure elements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. However, in this action, EPA is only addressing element 110(a)(2)(D)(i)(II) as it relates to PSD requirements.

Section 110(a)(2)(D) has two components; 110(a)(2)(D)(i) and 110(a)(2)(D)(ii). Section 110(a)(2)(D)(i) includes four distinct components, commonly referred to as "prongs," that must be addressed in infrastructure SIP submissions. The first two prongs, which are codified in section 110(a)(2)(D)(i)(I), are provisions that prohibit any source or other type of emissions activity in one state from contributing significantly to nonattainment of the NAAQS in another state ("prong 1"), and interfering with maintenance of the NAAQS in another state ("prong 2"). The third and fourth prongs, which are codified in section 110(a)(2)(D)(i)(II), are provisions that prohibit emissions activity in one state interfering with measures required to prevent significant deterioration of air quality in another state ("prong 3"), or to protect visibility in another state

(“prong 4”). Section 110(a)(2)(D)(ii) requires SIPs to include provisions insuring compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement.

In previous actions, EPA has already addressed Kentucky, North Carolina and Tennessee’s SIP submissions related to sections 110(a)(2)(D)(i)(I) and 110(a)(2)(D)(ii) for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. Today’s final conditional approval relates only to the requirements of section 110(a)(2)(D)(i), prong 3, which as previously described, requires that the SIP contain adequate provisions prohibiting emissions that interfere with any other state’s required measures to prevent significant deterioration of its air quality. More information on this requirement and EPA’s rationale for today’s conditional approval of this requirement for purposes of the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS is provided below.

## **II. This Action**

On July 3, 2012, and July 10, 2012, respectively, Kentucky and North Carolina submitted commitment letters to EPA requesting conditional approval of outstanding PSD requirements related to the New Source Review (NSR) PM<sub>2.5</sub> Rule and the PM<sub>2.5</sub> PSD Increment - Significant Impact Levels (SILs) - Significant Monitoring Concentration (SMC) Rule. EPA determined that these letters of commitment met the requirements of section 110(k)(4) of the CAA, and accordingly, EPA conditionally approved the NSR PM<sub>2.5</sub> Rule and PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule submission for Kentucky on October 3, 2012, (77 FR 60307) and the submission for North Carolina on October 16, 2012 (77 FR 63234). EPA is relying upon these commitments to address the NSR PM<sub>2.5</sub> Rule and the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule (only as it relates to PM<sub>2.5</sub> increments) as the basis for conditionally approving Kentucky and North Carolina’s infrastructure SIPs as they relate to prong 3 of section 110(a)(2)(D)(i). If Kentucky fails to

submit the revisions described in its July 3, 2012, commitment letter by October 3, 2013, today's conditional approval of prong 3 for Kentucky will automatically become a disapproval, and EPA will issue a finding of disapproval. Likewise, if North Carolina fails to submit the revisions described in its July 10, 2012, commitment letter by October 16, 2013, today's conditional approval of prong 3 for North Carolina will automatically become a disapproval, and EPA will issue a finding of disapproval. EPA is not required to propose the finding of disapproval. If either conditional approval is converted to a disapproval, that final disapproval would trigger the Federal Implementation Plan (FIP) requirement under section 110(c). However, if the State meets its commitment within the applicable timeframe, the conditionally approved submission will remain a part of the SIP until EPA takes final action on the submittals.

On October 4, 2012, Tennessee submitted a commitment letter to EPA requesting conditional approval of specific enforceable measures related to prong 3 of section 110(a)(2)(D)(i); specifically, the applicable requirements of the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule (only as it relates to PM<sub>2.5</sub> increments). Consistent with section 110(k)(4) of the Act, EPA is relying upon this commitment by Tennessee to address the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule (only as it relates to PM<sub>2.5</sub> increments) as the basis for conditionally approving Tennessee's infrastructure SIP as it relates to prong 3 of section 110(a)(2)(D)(i). If Tennessee fails to submit these revisions by March 6, 2014, today's conditional approval will automatically become a disapproval on that date and EPA will issue a finding of disapproval. EPA is not required to propose the finding of disapproval. If the conditional approval is converted to a disapproval, the final disapproval triggers the FIP requirement under section 110(c). However, if the State meets its commitment within the applicable timeframe, the conditionally approved submission will

remain a part of the SIP until EPA takes final action approving or disapproving the new submittal.

EPA received one comment on its December 5, 2012, proposed rulemaking to conditionally approve Kentucky, North Carolina and Tennessee's SIP submissions as meeting the section 110(a)(2)(D)(i)(II) requirements of the CAA for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. The Commenter wanted "to congratulate EPA workers for trying to decrease particles and increase the public's health." This comment does not appear to be related to the issues presented in the proposed rulemaking, and instead, appears related to a wholly separate topic - promulgation of the PM NAAQS. EPA does not interpret this comment as relevant to the topic of EPA's December 5, 2012, proposed action. Instead, EPA interprets this comment as off-topic and outside of the scope of today's final rulemaking.

EPA notes that on January 4, 2013, the U.S. Court of Appeals, in *Natural Resources Defense Council v. EPA*, No. 08-1250, 2013 WL 45653 (D.C. Cir., filed July 15, 2008) (consolidated with 09-1102, 11-1430), issued a judgment that remanded EPA's 2007 and 2008 rules implementing the 1997 PM<sub>2.5</sub> NAAQS. The court ordered EPA to "repromulgate these rules pursuant to Subpart 4 consistent with this opinion." *Id.* at \*8. Subpart 4 of Part D, Title 1 of the CAA establishes additional provisions for particulate matter nonattainment areas.

The 2008 implementation rule (NSR PM<sub>2.5</sub> Rule) addressed by the court decision promulgated NSR requirements for implementation of PM<sub>2.5</sub> in both nonattainment areas (nonattainment NSR) and attainment/unclassifiable areas (PSD). *See* 73 FR 28321 (May 16, 2008). As the requirements of Subpart 4 only pertain to nonattainment areas, EPA does not consider the portions of the 2008 rule that address requirements for PM<sub>2.5</sub> attainment and

unclassifiable areas to be affected by the court's opinion. Moreover, EPA does not anticipate the need to revise any PSD requirements promulgated in the 2008 rule in order to comply with the court's decision. Accordingly, EPA's actions for the Kentucky, North Carolina and Tennessee infrastructure SIPs as related to element (D)(i)(II) with respect to the PSD requirements promulgated by the 2008 implementation rule does not conflict with the court's opinion.

The court's decision with respect to the nonattainment NSR requirements promulgated by the 2008 implementation rule also does not affect EPA's action on the present infrastructure action. EPA interprets the Act to exclude nonattainment area requirements, including requirements associated with a nonattainment NSR program, from infrastructure SIP submissions due 3 years after adoption or revision of a NAAQS. Instead, these elements are typically referred to as nonattainment SIP or attainment plan elements, which would be due by the dates statutorily prescribed under subpart 2 through 5 under part D, extending as far as 10 years following designations for some elements.

Once the above-described specific enforceable measures related to the PM<sub>2.5</sub> Rule and the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule (only as it relates to PM<sub>2.5</sub> increments) have been adopted into the respective SIPs of Kentucky, North Carolina and Tennessee, the infrastructure SIPs for these states will adequately address applicable requirements of section 110(a)(2)(D)(i), prong 3 for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. EPA has determined that Kentucky, North Carolina and Tennessee's submissions, in conjunction with the above-described revisions, are consistent with section 110 of the CAA.

### **III. Final Action**

As described above, EPA is conditionally approving the SIP submissions for Kentucky, North Carolina and Tennessee as addressing prong 3 of section 110(a)(2)(D)(i) of the CAA for both the 1997 and 2006 PM<sub>2.5</sub> NAAQS.

### **IV. Statutory and Executive Order Reviews**

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

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 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, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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 action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document in the Federal Register].

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements.

*See* section 307(b)(2).

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

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate Matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 11, 2013

A. Stanley Meiburg

Acting Regional Administrator,

Region 4.

40 CFR part 52 is amended as follows:

**PART 52-[AMENDED]**

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

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

**Subpart S—Kentucky**

2. Section 52.919 is amended by adding paragraph (c) to read as follows:

**§ 52.919 Identification of plan-conditional approval.**

\* \* \* \* \*

(c) Kentucky submitted a commitment letter to EPA on July 3, 2012, requesting conditional approval of outstanding requirements related to the NSR PM<sub>2.5</sub> Rule. In this letter, the Commonwealth provided a schedule as to how it will address outstanding requirements related to the NSR PM<sub>2.5</sub> Rule (including PM<sub>2.5</sub> PSD Increment-SILs-SMC, as it relates to PM<sub>2.5</sub> increments to meet the prong 3 requirements of section 110(a)(2)(D)(i)). EPA conditionally approved the NSR PM<sub>2.5</sub> Rule submission for Kentucky on October 3, 2012, (77 FR 60307). If the Commonwealth fails to submit these revisions by October 3, 2013, the conditional approval will automatically become a disapproval on that date and EPA will issue a finding of disapproval.

**Subpart II—North Carolina**

3. Section 52.1773 is amended by adding paragraph (c) to read as follows:

**§ 52.1773 Conditional Approval.**

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(c) North Carolina submitted a commitment letter to EPA on July 10, 2012, requesting conditional approval of outstanding requirements related to the NSR PM<sub>2.5</sub> Rule. In this letter, North Carolina provided a schedule as to how it will address outstanding requirements related to the NSR PM<sub>2.5</sub> Rule (including PM<sub>2.5</sub> PSD Increment-SILs-SMC, as it relates to PM<sub>2.5</sub> increments to meet the prong 3 requirements of section 110(a)(2)(D)(i)). EPA conditionally approved the NSR PM<sub>2.5</sub> Rule submission for North Carolina on October 16, 2012, (77 FR 63234). If the North Carolina fails to submit these revisions by October 16, 2013, the conditional approval will automatically become a disapproval on that date and EPA will issue a finding of disapproval.

#### **Subpart RR—Tennessee**

4. Section 52.2219 is amended by revising paragraph (e) to read as follows:

#### **§ 52.2219 Conditional Approval.**

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(e) Conditional Approval. On October 4, 2012, Tennessee submitted a commitment letter to EPA requesting conditional approval of specific enforceable measures related to prong 3 of section 110(a)(2)(D)(i); specifically, the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule (only as it relates to PM<sub>2.5</sub> increments) for the 1997 annual and 2006 24-hour fine particulate matter (PM<sub>2.5</sub>) national ambient air quality standards. EPA is conditionally approving Tennessee's commitment to address outstanding requirements promulgated in the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule

(only as it relates to PM<sub>2.5</sub> increments). If Tennessee fails to submit these revisions by March 6, 2014, the conditional approval will automatically become a disapproval on that date and EPA will issue a finding of disapproval.

[FR Doc. 2013-06646 Filed 03/25/2013 at 8:45 am; Publication Date: 03/26/2013]