6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2014-0186; FRL-9920-20-Region 3]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia; Preconstruction Requirements – Nonattainment New Source Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve an April 5, 2013 State Implementation Plan (SIP) revision submitted by the District Department of the Environment (DDOE) for the District of Columbia (D.C.). This revision pertains to D.C.'s nonattainment New Source Review (NSR) program, notably provisions for Plantwide Applicability Limits (PALs) and preconstruction permitting requirements for major sources of fine particulate matter ($PM_{2.5}$). This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before **[insert date 30 days from date of publication]**.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-R03-OAR-2014-0186 by one of the following methods:

A. www.regulations.gov. Follow the on-line instructions for submitting comments.

B. E-mail: kreider.andrew@epa.gov.

C. Mail: EPA-R03-OAR-2014-0186, Andrew Kreider, Acting Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R03-OAR-2014-0186. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website 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 www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the 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, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at District of Columbia Department of the Environment, Air Quality Division, 1200 1st Street NE., 5th floor, Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Mr. David Talley, (215) 814-2117, or by e-mail at talley.david@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On April 5, 2013, DDOE submitted a SIP revision request to EPA. This SIP revision request, if approved, would revise D.C.'s currently approved nonattainment NSR program by amending Chapters 1 and 2 under Title 20 of D.C. Municipal Regulations (DCMR). Generally, the revisions incorporate provisions related to two Federal rulemaking actions: the 2002 "Prevention of Significant Deterioration (PSD) and Nonattainment NSR (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects" (2002 NSR Rules; 67 FR 80186); and the 2008 "Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$)" (2008 NSR $PM_{2.5}$ Rule; 73 FR 28321).

The 2002 NSR Reform rules made changes to five areas of the NSR programs. In summary, the 2002 Rules: (1) provided a new method for determining baseline actual emissions; (2) adopted an actual-to-projected-actual methodology for determining whether a major modification has

occurred; (3) allowed major stationary sources to comply with a Plantwide Applicability Limit (PAL) to avoid having a significant emissions increase that triggers the requirements of the major NSR program; (4) provided a new applicability provision for emissions units that are designated clean units; and (5) excluded pollution control projects (PCPs) from the definition of "physical change or change in the method of operation." On November 7, 2003, EPA published a notice of final action on its reconsideration of the 2002 NSR Reform Rules[1], which added a definition for "replacement unit" and clarified an issue regarding PALs. For additional information on the 2002 NSR Reform Rules, see EPA's December 31, 2002 final rulemaking action entitled: "Prevention of Significant Deterioration (PSD) and Nonattainment NSR (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects" (67 FR 80186), the 2003 final reconsideration: "Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Reconsideration" (68 FR 63021), and http://www.epa.gov/nsr.

After the 2002 NSR Reform Rules were finalized and effective (March 3, 2003), industry, state, and environmental petitioners challenged numerous aspects of the 2002 NSR Reform Rules, along with portions of EPA's 1980 NSR Rules (45 FR 52676, August 7, 1980). On June 24, 2005, the United States Court of Appeals for the District of Columbia (D.C. Circuit) issued a decision on the challenges to the 2002 NSR Reform Rules. *New York v. United States*, 413 F.3d 3 (*New York I*).

[1] *See,* "Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Reconsideration;" (68 FR 63021)

In summary, the D.C. Circuit vacated portions of the rules pertaining to clean units and PCPs, remanded a portion of the rules regarding recordkeeping and the term "reasonable possibility" found in 40 CFR 52.21(r)(6) and 40 CFR 51.166(r)(6), and either upheld or did not comment on the other provisions included as part of the 2002 NSR Reform Rules. On June 13, 2007 (72 FR 32526), EPA took final action to revise the 2002 NSR Reform Rules to remove from federal law all provisions pertaining to clean units and the PCP exemption that were vacated by the D.C. Circuit.

The 2008 NSR $PM_{2.5}$ Rule (as well as the 2007 "Final Clean Air Fine Particle Implementation Rule" (2007 $PM_{2.5}$ Implementation Rule)[2]), was also the subject of litigation before the D.C. Circuit in *Natural Resources Defense Council v. EPA*.[3] On January 4, 2013, the court remanded to EPA both the 2007 $PM_{2.5}$ Implementation Rule and the 2008 NSR $PM_{2.5}$ Rule. The court found that in both rules EPA erred in implementing the 1997 $PM_{2.5}$ NAAQS solely pursuant to the general implementation provisions of subpart 1 of part D of title I of the CAA (subpart 1), rather than pursuant to the additional implementation provisions specific to particulate matter in subpart 4 of part D of title I (subpart 4).[4] As a result, the court remanded both rules and instructed EPA "to re-promulgate these rules pursuant to subpart 4 consistent with this opinion." Although the D.C. Circuit declined to establish a deadline for EPA's response, EPA intends to respond promptly to the court's remand and to promulgate new generally applicable

[2] 72 FR 20586 (April 25, 2007)

[3] 706 F.3d 428 (D.C. Cir. 2013)

[4] The court's opinion did not specifically address the point that implementation under subpart 4 requirements would still require consideration of subpart 1 requirements, to the extent that subpart 4 did not override subpart 1. EPA assumes that the court presumed that EPA would address this issue of potential overlap between subpart 1 and subpart 4 requirements in subsequent actions

implementation regulations for the $PM_{2.5}$ NAAQS in accordance with the requirements of subpart 4. In the interim, however, states and EPA still need to proceed with implementation of the 1997 $PM_{2.5}$ NAAQS in a timely and effective fashion in order to meet statutory obligations under the CAA and to assure the protection of public health intended by those NAAQS. In a June 2, 2014 final rulemaking entitled "Identification of Nonattainment Classification and Deadlines for Submission of State Implementation Plan (SIP) Provisions for the 1997 Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) and 2006 $PM_{2.5}$ NAAQS; Final Rule," (79 FR 31566), EPA identified the classification under subpart 4 for areas currently designated nonattainment for the 1997 and 2006 $PM_{2.5}$ NAAQS. That rulemaking also established a December 31, 2014 deadline for the submission of any additional attainment related SIP elements that may be needed to meet the applicable requirements of subpart 4.

Additionally, the 2008 NSR $PM_{2.5}$ final rule authorized states to adopt provisions in their nonattainment NSR rules that would allow major stationary sources and major modifications locating in areas designated nonattainment for $PM_{2.5}$ to offset emissions increases of direct $PM_{2.5}$ emissions or $PM_{2.5}$ precursors with reductions of either direct $PM_{2.5}$ emissions or $PM_{2.5}$ precursors in accordance with offset ratios contained in the approved SIP for the applicable nonattainment area. The inclusion, in whole or in part, of the interpollutant offset provisions for $PM_{2.5}$ is discretionary on the part of the states. In the preamble to the 2008 final rule, EPA included preferred or presumptive offset ratios, applicable to specific $PM_{2.5}$ precursors that states may adopt in conjunction with the new interpollutant offset provisions for $PM_{2.5}$, and for which the state could rely on the EPA's technical work to demonstrate the adequacy of the ratios for use in any $PM_{2.5}$ nonattainment area. Alternatively, the preamble indicated that states may adopt their own ratios, subject to the EPA's approval, that would have to be substantiated by modeling

or other technical demonstrations of the net air quality benefit for ambient $PM_{2.5}$ concentrations. The preferred ratios were subsequently the subject of a petition for reconsideration, which the Administrator granted. EPA continues to support the basic policy that sources may offset increases in emissions of direct $PM_{2.5}$ or of any $PM_{2.5}$ precursor in a $PM_{2.5}$ nonattainment area with actual emissions reductions in direct $PM_{2.5}$ or $PM_{2.5}$ precursors in accordance with offset ratios as approved in the SIP for the applicable nonattainment area. However, we no longer consider the preferred ratios set forth in the preamble to the 2008 final rule for $PM_{2.5}$ NSR implementation to be presumptively approvable. Instead, any ratio involving $PM_{2.5}$ precursors adopted by the state for use in the interpollutant offset program for $PM_{2.5}$ nonattainment areas must be accompanied by a technical demonstration that shows the net air quality benefits of such ratio for the $PM_{2.5}$ nonattainment area in which it will be applied.

A Technical Support Document (TSD) is included in the docket for this action, and contains additional detail regarding the history and background of the Federal counterparts to the regulations included in DDOE's submittal, which will not be restated here.

II. Summary of SIP Revision

Generally, the revision submitted by DDOE involves amendments to sections 199.1 (Definitions and Abbreviations) and 200 (General Permit Requirements), repealing and replacing section 204 (Permit Requirements for Sources Affecting Non-attainment Areas), repealing section 206 (Notice and Comment Prior to Permit Issuance), adding sections 208 (General and Non-attainment Areas) and 210 (Notice and Comment Prior to Permit Issuance), and adding specific definitions to section 299 (Definitions and Abbreviations). Additionally, several non-

substantive, clarifying and organizational revisions were submitted. Following is EPA's rationale for the proposed approval.

A. NSR Reform

DDOE has not adopted the full suite of NSR reform regulations, opting instead for a "hybrid" approach, tailored to the particular air quality challenges and source universe in D.C. The vast majority of sources in D.C. are institutional (e.g. hospitals, universities). Because it focused on large industrial source categories, much of the analysis performed by EPA in support of the 2002 Reform Rules may not be applicable in D.C. However, as EPA stated in the preamble of the 2002 NSR Rules: "…state and local jurisdictions have significant freedom to customize their NSR programs. Ever since the current NSR regulations were adopted in 1980, we have taken the position that States may meet the requirements of part 51 'with different but equivalent regulations. 45 FR 52676.' Several States have, indeed, implemented programs that work every bit as well as our own base programs, yet depart substantially from the basic framework established in our rules…" (See 67 FR 80241). Therefore, EPA is able to approve state SIP revisions that are at least as stringent as the Federal rules even if they contain provisions that differ. EPA's proposed approval in this case, therefore, hinges upon the determination that the proposed revisions are at least equivalent to the Federal program and do not constitute an impermissible backslide under the CAA.

1. Calculating Emissions Increases

In order for a physical change or change in the method of operation at a major stationary source to be considered a major modification and trigger NSR requirements, the net emissions increase

resulting from the project at hand must exceed the significance threshold(s) for one or more pollutant. One of the primary components of the 2002 NSR Reform Rules was a change in the regulations governing how to quantify the emissions increase relative to the pre-project baseline. Federal regulations allow the use of "baseline actual emissions" (BAE) to determine a facility's emissions prior to the change. For a facility that is not an electric generating unit (EGU), BAE is calculated by selecting any 24-month period during the preceding ten years and computing the average emission rate. The "look-back" period for EGUs is five years. DDOE has not adopted the Federal regulations relating to the calculation of BAE; rather, DDOE has retained the pre-NSR reform definition of "actual emissions." Actual emissions are calculated by averaging the emissions in the 24-month period immediately preceding the project at hand. The revisions to the definition of "actual emissions" submitted by DDOE do not substantively change the look-back period for calculating actual emissions. Rather, they clarify that DDOE may allow the use of a different time period within the last five years if a demonstration can be made that it is more representative of the facility's operations. Additionally, the revisions require that the same 24-month period be used for all pollutants. These proposed revisions differ from the Federal regulations which allow different 24-month periods to be used for different pollutants.

Once the baseline has been established, it is necessary to calculate the increase resulting from the project relative to that baseline. Federal regulations allow a source to use "projected actual emissions" (PAE) which predict future emissions, based on several factors including business projections. PAE also allows a source to exclude from consideration those emissions which could legally and physically have been emitted prior to the modification. DDOE's regulations (and indeed EPA's pre-reform regulations) require sources to use the full potential to emit (PTE) to calculate the increase, and do not allow for the exclusion of emissions that the facility could

have accommodated prior to the change. This is codified in the definition of "net emissions increase," previously at 20 DCMR section 199.1. In the proposed revisions, that definition is re-codified under section 299.1, however the substantive requirements are not changed. It is also important to note that, because DDOE's regulations do not allow for the use of PAE, and because every source wishing to construct or modify in D.C. must receive authorization from DDOE prior to doing so, the "reasonable possibility" provisions of NSR Reform do not apply.

2. Plantwide Applicability Limits (PALs)

The most notable component of the 2002 NSR Reform rules being adopted by D.C. are provisions for DDOE to issue Plantwide Applicability Limits, or PALs. A PAL is a facility-wide, pollutant specific limit that allows sources to make modifications without triggering major NSR requirements, as long as the plantwide emissions of that pollutant do not exceed the PAL. EPA's rationale for adopting PALs in 2002 was that they would encourage the installation of newer, more efficient, and lower emitting equipment by providing sources the flexibility to do so without triggering NSR requirements. For sources, the trade-off for this flexibility is a number of enhanced monitoring requirements.

Under Federal regulations, a PAL is set by calculating the facility's BAE of the PAL pollutant (as described above), and adding the significance level for that pollutant, as defined by 40 CFR 51.165(a)(1)(x)(A). Federal PALs have a term of ten years. The PAL provisions being proposed by D.C. for approval into the SIP differ from the Federal PAL regulations in two ways. First, PALs issued by DDOE have a five year term, rather than a ten year term. Second, as previously discussed, DDOE has not adopted BAE provisions for calculating the pre-project emissions

baseline. Therefore, in order to establish the PAL, the significance level for the PAL pollutant is added to the pre-NSR Reform definition of "actual emissions."

B. $PM_{2.5}$

The $PM_{2.5}$ provisions submitted by DDOE for approval into the D.C. SIP largely mirror the 2008 NSR $PM_{2.5}$ Rule, which: (1) required NSR permits to address directly emitted $PM_{2.5}$ and precursor pollutants; (2) established significant emission rates for direct $PM_{2.5}$ and precursor pollutants (including sulfur dioxide (SO_2) and oxides of nitrogen (NOx)); (3) established $PM_{2.5}$ emission offsets; and (4) required states to account for gases that condense to form particles (condensables) in $PM_{2.5}$ emission limits.

Additionally, DDOE's submittal includes provisions allowing sources to offset emissions increases of direct $PM_{2.5}$ emissions or $PM_{2.5}$ precursors with reductions of either direct $PM_{2.5}$ emissions or $PM_{2.5}$ precursors in accordance with offset ratios contained in the approved SIP for the applicable nonattainment area. DDOE's submittal does not, however, contain the presumptive offset trading ratios from the 2008 NSR $PM_{2.5}$ Rule that were subject to the petition for reconsideration. As previously discussed, while the presumptively approvable interpollutant trading ratios from the 2008 NSR $PM_{2.5}$ Rule are no longer supported, EPA does continue to support the policy allowing an interpollutant offset program. However, in order for sources in D.C. to utilize such a program, DDOE must develop and submit to EPA for approval, a technical demonstration justifying the ratios to be used, and showing the net air quality benefits of such ratio for the $PM_{2.5}$ nonattainment area in which it will be applied.

EPA is in the process of evaluating the requirements of subpart 4 as they pertain to nonattainment NSR. In particular, subpart 4 includes section 189(e) of the CAA, which requires

the control of major stationary sources of PM_{10} precursors (and hence under the court decision, $PM_{2.5}$ precursors) "except where the Administrator determines that such sources do not contribute significantly to PM_{10} levels which exceed the standard in the area." The evaluation of which precursors need to be controlled to achieve the standard in a particular area is typically conducted in the context of the state's preparing and the EPA's reviewing of an area's attainment plan SIP. In this case, there was previously only one designated $PM_{2.5}$ nonattainment area, the D.C. portion of the Washington, DC-MD-VA nonattainment area for the 1997 annual $PM_{2.5}$ NAAQS.

With respect to this nonattainment area, DDOE submitted an attainment plan on April 2, 2008. On January 12, 2009, EPA finalized a clean data determination for the area, (74 FR 1146), which suspended the requirement for DDOE to submit, among other things, an attainment plan SIP for the area. Accordingly, on February 6, 2012, DDOE withdrew the attainment plan SIP, and it is no longer before EPA. Moreover, on October 6, 2014, (FR 60081), EPA took final action to redesignate the Metro-Washington area to attainment. This redesignation absolves the District of any further obligation to comply with the subpart 4 requirements for nonattainment NSR as to this area unless and until there is a future designation of nonattainment for a $PM_{2.5}$ NAAQS. Therefore, EPA is not evaluating the April 5, 2013 submittal for the purposes of determining compliance with the subpart 4 requirements.

III. Proposed Action

EPA's review of this material indicates that with the proposed amendments to the D.C. Municipal Regulations, DDOE's nonattainment NSR program is equivalent to, and at least as stringent as Federal regulations. Therefore, EPA is proposing to approve the D.C. SIP revision

which was submitted on April 5, 2013. EPA is not acting on DDOE's submittal for purposes of determining compliance with the subpart 4 requirements relating to $PM_{2.5}$. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

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 CAA 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 (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 proposed rule, relating to the District of Columbia's nonattainment NSR program, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: November 28, 2014.

William C. Early, Acting
Regional Administrator,
Region III.

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