6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2014-0904; FRL-9934-26-Region 4]

Air Plan Approval; TN; Reasonably Available Control Measures and Redesignation for the TN Portion of the Chattanooga 1997 Annual $PM_{2.5}$ Nonattainment Area

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule; supplemental.

SUMMARY: The Environmental Protection Agency (EPA) is proposing two separate but related actions pertaining to the Tennessee portion of the Chattanooga nonattainment area for the 1997 annual fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS) (hereinafter referred to as the "Chattanooga TN-GA-AL Area" or "Area"). First, EPA is proposing to approve the portion of the attainment plan state implementation plan (SIP) revision submitted by the State of Tennessee, through the Tennessee Department of Environment and Conservation (TDEC), on October 15, 2009, that addresses reasonably available control measures (RACM), including reasonably available control technology (RACT), for the Tennessee portion of the Area. EPA is not proposing to act on the portions of the SIP revision that are unrelated to RACM. Second, EPA is supplementing the Agency's March 27, 2015, proposed approval of Tennessee's November 13, 2014, redesignation request for the Tennessee portion of the Area by proposing that approval of the RACM portion of the aforementioned SIP

revision satisfies the applicable RACM requirements for redesignation under the Clean Air Act (CAA or Act).

DATES: Comments must be received on or before [insert date 21 days after date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2014-0904, by one of the following methods:

1. www.regulations.gov: Follow the on-line instructions for submitting comments.
2. E-mail: R4-ARMS@epa.gov.
3. Fax: (404) 562-9019.
4. Mail: "EPA-R04-OAR-2014-0904," Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.
5. Hand Delivery or Courier: Lynorae Benjamin, Chief, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA-R04-OAR-2014-0904. 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 through www.regulations.gov or e-mail, information that you consider to be CBI or otherwise protected. 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. For additional information about EPA's public docket visit the EPA Docket Center homepage at http://www.epa.gov/epahome/dockets.htm.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information may not be 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 at the Air Regulatory Management Section, Air Planning and Implementation

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: Joel Huey, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Mr. Huey's phone number is (404) 562-9104. He can also be reached via electronic mail at huey.joel@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On July 18, 1997, EPA promulgated the first air quality standards for $PM_{2.5}$. EPA promulgated an annual standard at a level of 15 micrograms per cubic meter ($\mu g/m^3$) (based on a 3-year average of annual mean $PM_{2.5}$ concentrations) and a 24-hour standard of 65 $\mu g/m^3$ (based on a 3-year average of the 98^{th} percentile of 24-hour concentrations). *See* 62 FR 36852. On January 5, 2005, and supplemented on April 14, 2005, EPA designated Hamilton County in Tennessee, in association with counties in Alabama and Georgia in the Chattanooga TN-GA-AL Area, as nonattainment for the 1997 Annual $PM_{2.5}$ NAAQS. *See* 70 FR 944 and 70 FR 19844, respectively. Designation of an area as nonattainment for $PM_{2.5}$ starts the process for a state to develop and submit to EPA an attainment plan SIP revision under title I, part D of the CAA. This SIP revision must include, among other elements, a demonstration of how the NAAQS will

be attained in the nonattainment area as expeditiously as practicable, but no later than the attainment date required by the CAA.

EPA designated all 1997 $PM_{2.5}$ NAAQS areas under title I, part D, subpart 1 (hereinafter "Subpart 1"). Subpart 1 contains the general requirements for nonattainment areas for criteria pollutants and is less prescriptive than the other subparts of title I, part D. On April 25, 2007, EPA promulgated a rule, codified at 40 CFR part 51, subpart Z, to implement the 1997 $PM_{2.5}$ NAAQS under Subpart 1 (hereinafter referred to as the "1997 $PM_{2.5}$ Implementation Rule").[1] *See* 72 FR 20586. On October 15, 2009, Tennessee submitted an attainment plan SIP revision pursuant to Subpart 1 and the 1997 $PM_{2.5}$ Implementation Rule that addressed RACM and contained a reasonable further progress (RFP) plan, base-year and attainment-year emissions inventories, and contingency measures for the Area.

On May 31, 2011 (76 FR 31239), EPA published a final determination that the Chattanooga TN-GA-AL Area had attained the 1997 Annual $PM_{2.5}$ NAAQS based upon quality-assured and certified ambient air monitoring data for the 2007-2009 time period. In that determination and in accordance with the 1997 $PM_{2.5}$ Implementation Rule at 40 CFR 51.1004(c), EPA suspended the requirements for the Chattanooga TN-GA-AL Area to submit attainment demonstrations and associated RACM, RFP plans, contingency measures, and other planning SIPs related to attainment of the 1997 Annual $PM_{2.5}$ NAAQS, so long as the Area continues to attain the 1997 Annual $PM_{2.5}$ NAAQS. *See* 40 CFR 52.2231(c); 76 FR 31239.

[1] On January 4, 2013, in *Natural Resources Defense Council v. EPA*, 706 F.3d 428 (D.C. Cir. 2013), the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) found that EPA erred in implementing the 1997 $PM_{2.5}$ NAAQS pursuant solely to the general implementation provisions of Subpart 1 rather than the particulate matter-specific provisions of title I, part D, subpart 4. The court remanded both the 1997 $PM_{2.5}$ Implementation Rule and the final rule entitled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$)" (73 FR 28321, May 16, 2008) to EPA to address this error.

Tennessee submitted a request to EPA on November 13, 2014, to redesignate the State's portion of the Chattanooga TN-GA-AL Area to attainment for the 1997 Annual $PM_{2.5}$ NAAQS and to approve a SIP revision containing a maintenance plan for the Tennessee portion of the Area. EPA proposed to approve the redesignation request and the related SIP revision in an action signed on March 11, 2015, based, in part, on the Agency's longstanding interpretation that Subpart 1 nonattainment planning requirements, including RACM, are not "applicable" for purposes of CAA section 107(d)(3)(E)(ii) once an area is attaining the NAAQS and, therefore, need not be approved into the SIP before EPA can redesignate the area. *See* 80 FR 16331 (March 27, 2015).

On March 18, 2015, the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) issued an opinion in *Sierra Club v. EPA*, 781 F.3d 299 (6th Cir. 2015), that is inconsistent with this longstanding interpretation regarding section 107(d)(3)(E)(ii). In its decision, the Court vacated EPA's redesignation of the Indiana and Ohio portions of the Cincinnati-Hamilton nonattainment area to attainment for the 1997 $PM_{2.5}$ NAAQS because EPA had not yet approved Subpart 1 RACM for the Cincinnati Area into the Indiana and Ohio SIPs.[2] The Court concluded that "a State seeking redesignation 'shall provide for the implementation' of RACM/RACT, even if those measures are not strictly necessary to demonstrate attainment with the $PM_{2.5}$ NAAQS. . . . If a State has not done so, EPA cannot 'fully approve[]' the area's SIP, and redesignation to attainment status is improper." *Sierra Club*, 781 F.3d at 313.

[2] The Court issued an amended decision on July 14, 2015, revising some of the legal aspects of the Court's analysis of the relevant statutory provisions (section 107(d)(3)(E)(ii) and section 172(c)(1)) but maintaining its prior holding that section 172(c)(1) "unambiguously requires implementation of RACM/RACT prior to redesignation . . . even if those measures are not strictly necessary to demonstrate attainment with the $PM_{2.5}$ NAAQS." *See Sierra Club v. EPA*, Nos. 12-3169, 12-3182, 12-3420 (6th Cir. July 14, 2015).

II. What are EPA's Proposed Actions?

EPA is bound by the Sixth Circuit's decision in *Sierra Club v. EPA* within the Court's jurisdiction unless it is overturned.[3] Although EPA continues to believe that Subpart 1 RACM is not an applicable requirement under section 107(d)(3)(E) for an area that has already attained the 1997 Annual $PM_{2.5}$ NAAQS, EPA is proposing two separate but related actions regarding the Tennessee portion of the Chattanooga TN-GA-AL Area in response to the Court's decision.[4,5]

First, EPA is proposing to approve the portion of the State's October 15, 2009, attainment plan SIP revision that addresses RACM under Subpart 1 for the Tennessee portion of the Area. Second, EPA is supplementing the Agency's proposed approval of Tennessee's November 13, 2014, redesignation request for the Area by proposing that approval of the RACM portion of the aforementioned SIP revision satisfies the Subpart 1 RACM requirement in accordance with section 107(d)(3)(E) of the CAA. More detail on EPA's rationale for these proposed actions is provided below.

III. What is EPA's Analysis of the State's RACM Submittal?

a. Subpart 1 RACM Requirements

[3] The states of Kentucky, Michigan, Ohio, and Tennessee are located within the Sixth Circuit's jurisdiction.

[4] Pursuant to 40 CFR 56.5(b), the EPA Region 4 Regional Administrator signed a memorandum on July 20, 2015, seeking concurrence from the Director of EPA's Air Quality Policy Division (AQPD) in the Office of Air Quality Planning and Standards to act inconsistent with EPA's interpretation of CAA sections 107(d)(3)(E) and 172(c)(1) when taking action on pending and future redesignation requests in Kentucky and Tennessee because the Region is bound by the Sixth Circuit's decision in *Sierra Club v. EPA*. The AQPD Director issued her concurrence on July 22, 2015. The July 20, 2015, memorandum with AQPD concurrence is located in the docket for today's proposed actions.

[5] On September 3, 2015, the Sixth Circuit denied the petitions for rehearing en banc of this portion of its opinion that were filed by EPA, the state of Ohio, and industry groups from Ohio. *Sierra Club v. EPA*, Nos. 12-3169, 12-3182, 12-3420, Doc. 136-1 (6th Cir. Sept. 3, 2015).

Subpart 1 requires that each attainment plan "provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from the existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology), and shall provide for attainment of the national primary ambient air quality standards." *See* CAA section 172(c)(1). EPA interprets RACM, including RACT, under section 172(c)(1) as measures that are both reasonably available and necessary to demonstrate attainment as expeditiously as practicable in the nonattainment area. *See* 40 CFR 51.1010(a).[6] A state must adopt, as RACM, measures that are reasonably available considering technical and economic feasibility if, considered collectively, they would advance the attainment date by one year or more. *See* 40 CFR 51.1010(b).

The $PM_{2.5}$ Implementation Rule requires that the Subpart 1 RACM portion of the attainment plan SIP revision include the list of potential measures that a state considered and information sufficient to show that the state met all requirements for the determination of what constitutes RACM in a specific nonattainment area. *See* 40 CFR 51.1010(a). Any measures that are necessary to meet these requirements which are not already either federally promulgated, part of the state's implementation plan, or otherwise creditable in SIPs must be submitted in enforceable form as part of a state's attainment plan SIP revision for the area. As discussed above, an attainment determination suspends the requirement for a $PM_{2.5}$ nonattainment area to submit an attainment plan SIP revision so long as the area continues to attain the $PM_{2.5}$ NAAQS. *See* 40 CFR 51.1004(c).

[6] Subpart 1 RACM requirements at 40 CFR 51.1010 were not at issue in the D.C. Circuit's remand of the $PM_{2.5}$ implementation rule in the January 2013 *Natural Resources Defense Council v. EPA* decision and are therefore not subject to the Court's remand. *Cf. NRDC v. EPA*, 571 F.3d 1245, 1252-53 (D.C. Cir. 2009) (upholding a substantially similar interpretation of Subpart 1 RACM in the context of ozone implementation regulations).

b. Proposed action on RACM based upon attainment of the NAAQS

EPA is proposing to approve the portion of Tennessee's October 15, 2009, attainment plan SIP revision that addresses Subpart 1 RACM for the State's portion of the Area on the basis that the Area has attained the 1997 Annual $PM_{2.5}$ NAAQS and, therefore, no emission reduction measures are necessary to satisfy Subpart 1 RACM. As noted above, EPA has determined that the Area has attaining data for the 1997 Annual $PM_{2.5}$ NAAQS and met the standard by the April 5, 2010, attainment date. *See* 77 FR 31239. Because the Area has attained the standard, there are no emissions controls that could advance the attainment date; thus, no emissions controls are necessary to satisfy Subpart 1 RACM pursuant to 40 CFR 51.1010 (defining RACM as the level of control necessary to advance the attainment date by one year or more).

c. Proposed action on RACM based upon the State's control evaluation

Additionally, the portion of Tennessee's October 15, 2009, attainment plan SIP revision that addresses Subpart 1 RACM for the State's portion of the Area is approvable on the basis that the SIP revision demonstrates that no additional reasonably available controls would have advanced the attainment date projected therein.

Through participation in the regional planning efforts of the Visibility Improvement States and Tribal Association of the Southeast (VISTAS) and the Association for Southeastern Integrated Planning (ASIP), Tennessee determined that existing measures and measures planned for implementation by 2009 would result in the Chattanooga TN-GA-AL Area attaining the 1997 $PM_{2.5}$ NAAQS by the end of 2009. Air quality modeling conducted by ASIP indicated that the Area would attain the annual NAAQS in 2009 based upon projected emissions reductions from

sources within the Area after 2002 (the base year of the nonattainment emissions inventory). As discussed in Chapter 2.0 of the October 15, 2009, SIP revision, the State, in consultation with VISTAS and ASIP, considered the following existing federally enforceable measures in projecting the emissions inventory used for the 2009 modeling: tier 2 vehicle standards; heavy-duty gasoline and diesel highway vehicle standards; large nonroad diesel engine standards; nonroad spark-ignition engines and recreational engines standards; NOx SIP call; and the Clean Air Interstate Rule.

In Tennessee's RACM analysis, which appears in chapter 4.0 of the October 15, 2009, SIP revision, the State discusses its evaluation of sources of $PM_{2.5}$ and its precursors within the Tennessee portion of the Area and its determination that these sources were meeting Subpart 1 RACM levels of emissions control. As discussed above, a State must show that all Subpart 1 RACM (including RACT for stationary sources) necessary to demonstrate attainment as expeditiously as practicable have been adopted and must consider the cumulative impact of implementing available measures to determine whether a particular emission reduction measure or set of measures is required to be adopted as RACM. Potential measures that are reasonably available considering technical and economic feasibility must be adopted as RACM if, considered collectively, they would advance the attainment date by one year or more. Because the attainment demonstration in Tennessee's attainment plan SIP revision showed attainment of the 1997 $PM_{2.5}$ NAAQS in the Chattanooga TN-GA-AL Area by the end of 2009, only measures that would advance the attainment date to the end of 2008 would be considered as Subpart 1 RACM.[7]

[7] As noted in the preamble to the $PM_{2.5}$ Implementation Rule, if a "State could not achieve significant emissions reductions by the beginning of 2008 due to time needed to implement reasonable measures or other factors, then it

Based on the emissions inventory and other information, the State identified the categories of sources that should be evaluated for controls. These categories include permitted stationary sources; gasoline dispensing facilities; on-road mobile sources; non-road and stationary internal combustion engines; open burning; and home heating with wood.

With regard to permitted stationary sources, Tennessee noted that conservative sensitivity modeling, conducted by the Georgia Institute of Technology, showed that completely eliminating emissions of $PM_{2.5}$, nitrogen oxides, and sulfur dioxide from non-utility point sources in the Tennessee portion of the Area would result in only small reductions in $PM_{2.5}$ concentrations (0.06 $\mu g/m^3$ to 0.25 $\mu g/m^3$). Nevertheless, Tennessee performed a detailed analysis of each major source operating in the State's portion of the Area and determined that RACT levels of emission control were already in place.[8] This analysis, and the results of sensitivity modeling, indicated that no additional reductions were available from local permitted stationary sources that would result in attainment in 2008 rather than 2009. For gasoline dispensing facilities, Tennessee deemed the use of Stage 1 vapor recovery to be the RACT level of emissions control. Tennessee stated that the existing federally-approved inspection and maintenance program constitutes RACM for on-road mobile sources and that non-road mobile sources and stationary internal combustion engines are regulated by Federal rules. Regarding open burning, Chattanooga's federally-approved local implementation plan requires open burning permits, bans open burning from May 1 through September 30, and prohibits the burning of brush cleared for road building and trash in the Tennessee portion of the Area. The State also determined that only 712 households (0.6 percent of the total households in the Tennessee

---

could be concluded that reasonably available local measures would not advance the attainment date." *See* 72 FR 20617.

[8] See Appendix 12 of the SIP submittal for a detailed discussion of the State's analysis.

portion of the Area) were heating primarily with wood and that accelerated replacement of older wood burning stoves would not advance the attainment date given the "small portion of households using wood hearing, the mild local climate, and the normal purchases of Subpart AAA compliant wood burning stoves in the nonattainment area."

Through this evaluation, Tennessee determined that, for each category of potential measures, there were either no additional emission reductions that could be achieved or no emission reduction measures that could be practicably implemented in time to advance attainment to the end of 2008. EPA has reviewed the RACM portion of Tennessee's October 15, 2009, attainment plan SIP revision and agrees with the State's conclusion that no additional emissions reductions were available from local sources that would have advanced the projected 2009 attainment date.

IV. Why is EPA Supplementing Its Proposed Redesignation of the Area?

EPA's March 11, 2015, proposal to approve Tennessee's redesignation request for the Tennessee portion of the Area was based, in part, on the Agency's longstanding interpretation that Subpart 1 RACM need not be approved into a SIP before redesignation to attainment if the subject area is attaining the NAAQS. *See* 80 FR 16331. Although EPA disagrees with the portion of the Sixth Circuit's opinion in *Sierra Club v. EPA* that is inconsistent with this interpretation, the Agency is bound by this decision within the Court's jurisdiction unless it is overturned and must first approve Subpart 1 RACM into Tennessee's SIP before it can redesignate the Chattanooga TN-GA-AL Area to attainment. Therefore, EPA is supplementing its redesignation proposal to now rely on approval of the RACM portion of the State's October 15, 2009, attainment plan SIP revision.

V. Proposed Actions

EPA has reviewed the RACM portion of Tennessee's October 15, 2009, attainment plan SIP revision and proposes to approve it on the basis that it is consistent with the CAA, the CAA's implementing regulations, and EPA guidance for attainment demonstration submittals. EPA is also supplementing its March 27, 2015, proposed approval of the State's November 13, 2014, redesignation request for the Tennessee portion of the Chattanooga TN-GA-AL Area by proposing that approval of the RACM portion of the aforementioned SIP revision satisfies the Subpart 1 RACM requirement in accordance with section 107(d)(3)(E) of the CAA. Today's proposed actions are focused solely on addressing the Sixth Circuit's decision in *Sierra Club v. EPA* and do not reopen any other aspect of the March 27, 2015, proposal for comment.

V. 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. *See* 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 proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

- 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).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175

(65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

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, Sulfur oxides.

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

Dated: September 9, 2015.

Heather McTeer Toney

Regional Administrator,

Region 4.

[FR Doc. 2015-23382 Filed: 9/17/2015 08:45 am; Publication Date: 9/18/2015]