



**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R03-OAR-2015-0838; FRL-9947-76-Region 3]**

**Approval and Promulgation of Air Quality Implementation Plans; Virginia  
Infrastructure Requirements for the 2012 Fine Particulate Matter National Ambient Air  
Quality Standards**

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

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving a state implementation plan (SIP) revision submitted by the Commonwealth of Virginia (Virginia) pursuant to the Clean Air Act (CAA). Whenever new or revised national ambient air quality standards (NAAQS) are promulgated, the CAA requires states to submit a plan to address basic program elements, including but not limited to regulatory structure, monitoring, modeling, legal authority, and adequate resources necessary to assure implementation, maintenance, and enforcement of the NAAQS.

These elements are referred to as infrastructure requirements. The Commonwealth of Virginia made a submittal addressing the infrastructure requirements for the 2012 fine particulate matter (PM<sub>2.5</sub>) NAAQS.

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

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2015-0838. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) website. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (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 through [www.regulations.gov](http://www.regulations.gov) or may be viewed 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 Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

**FOR FURTHER INFORMATION CONTACT:** Ellen Schmitt, (215) 814-5787, or by e-mail at [schmitt.ellen@epa.gov](mailto:schmitt.ellen@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On July 18, 1997, the EPA promulgated a new 24-hour and a new annual NAAQS for PM<sub>2.5</sub> (62 FR 38652). Subsequently, on December 14, 2012, the EPA revised the level of the health based (primary) annual PM<sub>2.5</sub> standard to 12 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ). *See* 78 FR 3086 (January 15, 2013).<sup>1</sup>

Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements, and legal authority that are designed to assure attainment and maintenance of the NAAQS. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS,

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<sup>1</sup> In EPA's 2012 PM<sub>2.5</sub> NAAQS revision, EPA left unchanged the existing welfare (secondary) standards for PM<sub>2.5</sub> to address PM related effects such as visibility impairment, ecological effects, damage to materials and climate impacts. This includes an annual secondary standard of 15  $\mu\text{g}/\text{m}^3$  and a 24-hour standard of 35  $\mu\text{g}/\text{m}^3$ .

but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affect the content of the submission. The content of such SIP submission may also vary depending upon what provisions the state's existing SIP already contains.

## **II. Summary of SIP Revision**

On July 16, 2015, the Commonwealth of Virginia, through the Virginia Department of Environmental Quality (VADEQ), submitted a SIP revision that addresses the infrastructure elements specified in section 110(a)(2) of the CAA necessary to implement, maintain, and enforce the 2012 PM<sub>2.5</sub> NAAQS.<sup>2</sup> On March 7, 2016 (81 FR 11711), EPA published a notice of proposed rulemaking (NPR) proposing approval of the Virginia July 16, 2015 submittal. In the NPR, EPA proposed approval of the following infrastructure elements: Section 110(a)(2)(A), (B), (C), (D)(i)(II) (prevention of significant deterioration), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).

At this time, EPA is not taking action on section 110(a)(2)(D)(i)(I) of the CAA relating to interstate transport of emissions because Virginia's July 16, 2016 infrastructure SIP submittal did not include provisions for this element; therefore EPA will take later, separate action on section 110(a)(2)(D)(i)(I) for the 2012 PM<sub>2.5</sub> NAAQS for Virginia as explained in the NPR. Additionally, EPA is not at this time taking action on section 110(a)(2)(D)(i)(II) for visibility protection for the 2012 PM<sub>2.5</sub> NAAQS as explained in the NPR. Although Virginia's infrastructure SIP submittal for the 2012 PM<sub>2.5</sub> NAAQS referred to Virginia's regional haze SIP for section 110(a)(2)(D)(i)(II) for

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<sup>2</sup> To clarify, the "2013 PM<sub>2.5</sub> NAAQS" referred to in the Virginia SIP submittal is the same as the "2012 PM<sub>2.5</sub> NAAQS" EPA refers to in this rulemaking action. The final rule for this NAAQS was signed by the EPA Administrator on December 14, 2012, thereby it has been called the "2012 PM<sub>2.5</sub> NAAQS." However, the final rule was published in the Federal Register on January 15, 2013, with an effective date of March 13, 2013, resulting in it also being referred to as the "2013 PM<sub>2.5</sub> NAAQS."

visibility protection, EPA intends to take later, separate action on Virginia's submittal for these elements as explained in the NPR and the Technical Support Document (TSD) which accompanied the NPR. Finally, Virginia did not submit section 110(a)(2)(I) which pertains to the nonattainment requirements of part D, Title I of the CAA, because this element is not required to be submitted by the 3-year submission deadline of section 110(a)(1) and will be addressed in a separate process if necessary.

The rationale supporting EPA's proposed rulemaking action, including the scope of infrastructure SIPs in general, is explained in the published NPR and the TSD accompanying the NPR and will not be restated here. The NPR and TSD are available in the docket for this rulemaking at [www.regulations.gov](http://www.regulations.gov), Docket ID Number EPA-R03-OAR-2015-0838. No public comments were received on the NPR.

### **III. Final Action**

EPA is approving, as a revision to the Virginia SIP, the following elements of Virginia's July 16, 2015 SIP revision for the 2012 PM<sub>2.5</sub> NAAQS: Section 110(a)(2)(A), (B), (C), (D)(i)(II) (prevention of significant deterioration), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). Virginia's SIP revision provides the basic program elements specified in section 110(a)(2) necessary to implement, maintain, and enforce the 2012 PM<sub>2.5</sub> NAAQS. This final rulemaking action does not include action on sections 110(a)(2)(D)(i)(I) (interstate transport of emissions), and (D)(i)(II) (visibility protection) for the 2012 PM<sub>2.5</sub> NAAQS as previously discussed. Additionally, EPA is not taking action on section 110(a)(2)(I) which pertains to the nonattainment planning requirements of part D, title I of the CAA, because this element is not required to be submitted by the 3-year

submission deadline of section 110(a)(1) of the CAA, and will be addressed in a separate process if necessary.

#### **IV. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia**

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) “privilege” for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed.

Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia’s Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information “required by law,” including documents and information “required by federal law to maintain program delegation, authorization or approval,” since Virginia

must “enforce federally authorized environmental programs in a manner that is no less stringent than their federal counterparts. . . .” The opinion concludes that “[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by federal law to maintain program delegation, authorization or approval.”

Virginia’s Immunity law, Va. Code Sec. 10.1-1199, provides that “[t]o the extent consistent with requirements imposed by federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with federal law, which is one of the criteria for immunity.”

Therefore, EPA has determined that Virginia’s Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

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

### **A. General Requirements**

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 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 as defined in 18 U.S.C. 1151 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 and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

#### **B. Submission to Congress and the Comptroller General**

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).

### **C. Petitions for Judicial Review**

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 **[Insert date 60 days after date of publication 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, which satisfies certain infrastructure requirements of section 110(a)(2) of the CAA for the 2012 PM<sub>2.5</sub> NAAQS for the Commonwealth of Virginia, 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, Particulate matter, Reporting and recordkeeping requirements.

Dated: May 27, 2016.

Shawn M. Garvin,  
Regional Administrator,  
Region III.

40 CFR part 52 is amended as follows:

**PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

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

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

**Subpart VV—Virginia**

2. In § 52.2420, the table in paragraph (e) is amended by adding, to the end of the table, an entry for “Section 110(a)(2) Infrastructure Requirements for the 2012 Particulate Matter NAAQS.” The added text reads as follows:

**§ 52.2420 Identification of plan.**

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(e) \* \* \*

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
* * *	* *	* *	* *	
Section 110(a)(2) Infrastructure Requirements for the 2012 Particulate Matter NAAQS	Statewide	7/16/15	[Insert Federal Register publication date], [Insert Federal Register citation]	Docket #2015-0838. This action addresses the following CAA elements, or portions thereof: 110(a)(2) (A), (B), (C), (D)(i)(II)(PSD), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M)

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