



6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R03-OAR-2016-0042; FRL-9954-40-Region 3]**

**Approval and Promulgation of Air Quality Implementation Plans; Maryland; Revisions and Amendments to Regulations for Continuous Opacity Monitoring, Continuous Emissions Monitoring, and Quality Assurance Requirements for Continuous Opacity Monitors**

**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 State of Maryland. The revision pertains to changes and amendments to Maryland regulations for continuous opacity monitoring (COM or COMs) and continuous emissions monitoring (CEM or CEMs) and to an amendment adding requirements for Quality Assurance and Quality Control (QA/QC) as they pertain to COMs. EPA is approving these revisions to the COMs and CEMs requirements in accordance with the requirements of the Clean Air Act (CAA).

**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-2016-0042. All documents in the docket are listed on the [http:// www.regulations.gov](http://www.regulations.gov) website. Although listed in the index, some information is not publicly available, e.g., 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 <http://www.regulations.gov>, or please contact the person identified in the “For Further Information Contact” section for additional availability information.

**FOR FURTHER INFORMATION CONTACT:** Marilyn Powers, (215) 814-2308, or by e-mail at [powers.marilyn@epa.gov](mailto:powers.marilyn@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On June 17, 2016 (81 FR 39605), EPA published a notice of proposed rulemaking (NPR) for the State of Maryland. In the NPR, EPA proposed approval of revisions and amendments to COMAR 26.11.01 *General Administrative Requirements* related to requirements for COMs and CEMs and the addition of new COMAR 26.01.31 *Quality Assurance Requirements for Continuous Opacity Monitors (COMs)*. The formal SIP revision (#15-05) was submitted by Maryland through the Maryland Department of the Environment (MDE) on November 24, 2015. On February 26, 2016, MDE provided a supplemental letter indicating MDE was excluding portions of COMAR 26.11.01.10 submitted in the November 24, 2015 SIP submittal from EPA’s review and consideration as a SIP revision. The February 26, 2016 letter from MDE is available in the docket for this rulemaking and is available online at <http://www.regulations.gov>.<sup>1</sup>

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<sup>1</sup> Specifically, in the February 26, 2016 letter from MDE to EPA, MDE withdrew from EPA’s review and consideration the text in COMAR 26.11.01.10.A(4), in COMAR 26.11 .01.10.B(4), in COMAR 26.11.01.10D(2)(c), and in COMAR 26.11.01.10.F which had initially been included in the November 25, 2015 SIP submittal. MDE excluded provisions in COMAR 26.11.01.10 that refer to sections or subsections of COMAR 26.11.09 that are not yet in the State’s SIP. MDE plans to submit the COMAR 26.11.09 revisions along with these related provisions for approval into the SIP at a later date.

EPA had previously approved Maryland regulation COMAR 26.11.01.10 *Continuous Emissions Monitoring (CEM) Requirements* into the Maryland SIP on February 28, 1996. 61 FR 7418. COMAR 26.11.01.10 required large fuel-burning equipment burning coal and residual oil to install COMs and demonstrate compliance using COM data. The regulation established monitoring requirements, CEM installation requirements, CEM installation and certification schedules, quality assurance procedures for opacity monitors, and record keeping and reporting requirements. The regulation had previously incorporated by reference Maryland's Technical Memorandum 90-01 (TM 90), and required compliance determinations for the State's visible emissions limits and QA/QC for COMs in accordance with the procedures therein. The terms CEMs and COMs were used interchangeably in COMAR 26.11.01.10; therefore, MDE determined it was necessary to establish separate requirements for each.

The November 24, 2015 SIP submittal, as clarified and amended on February 26, 2016 by MDE, includes revisions to COMs and CEMs definitions in COMAR 26.11.01.01, administrative changes to reporting and recordkeeping requirements in COMAR 26.11.01.05, a revised COMAR 26.11.01.10 for COMs, a new COMAR 26.11.01.11 for CEMs, and new COMAR 26.11.31 for QA/QC procedures related to COMs. The November 24, 2015 submittal, as amended by MDE's February 26, 2016 letter, removes the requirement to use TM 90 for enforcement actions and for QA/QC requirements on applicable fuel-burning equipment and removes references to TM 90.

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

The SIP revision is comprised of four state actions pertaining to adjusted requirements for COMs and CEMs in COMAR 26.11.01.01, COMAR 26.11.01.05 and COMAR 26.11.01.10, new CEMs

provisions in COMAR 26.11.01.11, and new QA/QC requirements in COMAR 26.11.31. These four actions are a series of regulatory actions that result in a recodification of some existing requirements for COMs and CEMs, establishment of separate regulations and requirements for COMs and CEMs, removal of applicability of TM 90 for certain fuel-burning equipment and removal of references to TM 90, and codification of the QA/QC requirements for COMs that were formerly incorporated by reference in TM 90 into a new COMAR 26.11.31. Other specific requirements of the revised and amended COMAR regulations, and the rationale for EPA's approval action finding the regulations in accordance with section 110 of the CAA are explained in the NPR and in EPA's Technical Support Document (TSD) dated April 5, 2016, and will not be restated here. The NPR and TSD can be found in the docket for this rulemaking action available online at <http://www.regulations.gov>.

### **III. Public Comments and EPA Responses**

EPA received one set of comments on the proposal from the Environmental Integrity Project and the Chesapeake Climate Action Network (collectively referred to herein as "Commenter"). This set of these comments is provided in the docket for today's final rulemaking action.

**Comment 1:** The Commenter stated that it thought the SIP revision would improve the Maryland SIP because it separates the requirements for COMs from the requirements for CEMs. However, because of its concern regarding some of Maryland's permitting and enforcement actions on opacity and particulate matter (PM) issues, the Commenter submitted comments "to explain our understanding of the effect of the SIP revision that EPA is proposing to approve." The Commenter expressed concern with allowing "ineffective technical methods" in compliance demonstrations for opacity limits. The Commenter stated that a COM is an effective method of

measuring compliance with Maryland's SIP opacity limits and reserved judgment on whether it is ever appropriate to substitute another technology for COMs to demonstrate compliance with opacity limits. The Commenter stated that if a technology is to be substituted for COMs, it should include PM CEMS paired with an approved method that accounts for the condensable portion of PM. The Commenter stated that, for various reasons, EPA Reference Method 9, by itself, is not a sufficient substitute for COMs due to infrequency and weather condition issues. The Commenter acknowledged that the proposed action to approve revisions to COMAR 26.11.01.10, 26.11.01.11 and 26.11.01.01 for the Maryland SIP does not "allow Method 9 observations as a substitute for COM in compliance demonstrations for opacity." The Commenter noted that COMAR 26.11.01.10(A)(4), which allows fuel-burning sources to discontinue use of COMs under certain circumstances is not part of the November 24, 2015 SIP revision, as amended February 26, 2016, which EPA proposed to approve. Finally, the Commenter stated that no part of COMAR 26.11.09.05 [which contains Maryland's opacity limitation] was submitted with the November 24, 2015 SIP submittal, and thus no provision in the November 24, 2015 SIP submission allows discontinuation of COM at fuel burning sources.

**Response 1:** EPA thanks the Commenter for its statements. EPA confirms Commenter's statement that the NPR did not propose any action on COMAR 26.11.09.05, which contains opacity limitations in Maryland, as no part of that regulation was included in the November 24, 2015 submittal. The version of COMAR 26.11.09.05 which EPA approved in 2007 remains in the SIP. *See* 72 FR 41891 (August 1, 2007) (approving version of COMAR 26.11.09.05 for SIP with State effective date of November 24, 2003). EPA also confirms that the NPR did not include proposed action on the provisions in COMAR 26.11.01.10(A)(4), addressing removal of COMS, as that portion of COMAR 26.11.01.10 was removed from EPA's consideration by a

February 26, 2016 supplemental letter from MDE requesting that certain sections be struck from the submittal. In EPA's TSD which supported the NPR, EPA clearly explained the exclusions from our proposed approval action, stating that none of the newly adopted changes to COMAR 26.11.09 *Control of Fuel-Burning Equipment, Stationary Internal Combustion Engines, and Certain Fuel-Burning Installations* were included in the November 24, 2015 SIP submittal as MDE stated it intended to make further revisions to COMAR 26.11.09 before separately submitting for inclusion into the State's SIP. EPA also confirms that the NPR and TSD clearly indicated COMAR 26.11.01.10A(4), B(4), D(2)(c), and F were excluded from the November 24, 2015 SIP submittal by MDE's February 26, 2016 supplemental submission.

As to the Commenter's statement regarding the use of substitutes for COMs or the appropriateness of alternatives to use of COMs, EPA first notes that the comment is not germane to the regulation EPA proposed to approve in the NPR as COMAR 26.11.01.10 in the November 24, 2015 SIP submittal, as amended February 26, 2016, does not address alternatives to use of COMs to demonstrate compliance nor address substitutes. Thus, EPA provides no further response to the Commenter's general statement regarding appropriateness of substituting for COMs.

However, EPA notes generally that choice of compliance methods is left to State's for due consideration. Congress established the CAA such that each state has primary responsibility for assuring air quality within the state and such that each state determines an emission reduction program for its areas to attain and maintain air quality, subject to EPA approval, with such approval dependent upon whether the SIP as a whole meets the applicable requirements of the CAA. *See Commonwealth of Virginia, et al., v. EPA*, 108 F.3d 1397, 1410 (D.C. Cir. 1997)

(citing *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995)). While the requirement for Method 9 for compliance determinations is not part of the Maryland regulation for which EPA proposed approval, EPA notes that states have flexibility in devising and developing their choices as to the means of achieving attainment and maintenance of a NAAQS. This flexibility has been affirmed by the courts. *Id.* See also *Train v. NRDC*, 421 U.S. 60 (1975). EPA cannot disapprove a SIP revision simply based upon a state's choice of a particular emission monitoring requirement, such as a COM or CEM, as long as the SIP revision otherwise meets the requirements of the CAA. As explained in the NPR and the TSD, Maryland's November 24, 2015 SIP submission meets the requirements of the CAA under section 110.

With respect to the use of COMs, EPA Reference Method 9, or PM CEMs for determining compliance with opacity requirements, the choice of compliance methodology is a choice for the state as long as the state does not prohibit the use of credible evidence. EPA's credible evidence rule (62 FR 8314 (February 24, 1997)) provided clarifications regarding the use of any relevant credible evidence or information for determining compliance with an applicable emission limit or requirement. The credible evidence revisions consisted of various changes to 40 CFR 51.212, 52.12, 52.30, 60.11 and 61.12. These revisions provided minor modifications to existing regulatory provisions to clearly allow for the use of any credible evidence - that is, both reference test and comparable non-reference test data - to prove or disprove violations of the CAA in enforcement actions. These revisions make clear that EPA, states and citizens acting pursuant to section 304 of the CAA can prosecute actions for violations of CAA provisions and federally approved SIPs based exclusively on any credible evidence, without the need to rely on any data from a particular reference test (such as EPA Reference Method 9). The revisions also

have the effect of eliminating any potential ambiguity regarding the use of non-reference test data, including COMs and CEMs, as a basis for supporting violations. 40 CFR 51.212 specifically provides that “[f]or the purpose of ... establishing whether or not a person has violated or is in violation of any standard in this part, the plan must not preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed.” 40 CFR 51.212(c). In this rulemaking, EPA is approving a revision to COMAR 26.11.01.10 into the Maryland SIP which requires the use of COMs for determining compliance with SIP requirements. However, nothing in COMAR 26.11.01.10 precludes the use of credible evidence such as PM CEMs data or EPA Reference Method 9 readings to determine compliance with regulatory requirements including opacity limitations. Thus, the regulation at COMAR 26.11.01.10 submitted for SIP approval addresses and meets 40 CFR 51.212 as it does not preclude the use of credible evidence and addresses section 110 of the CAA for the Maryland SIP. The revisions to COMAR 26.11.01.01 and 26.11.01.10 and new provisions in COMAR 26.11.01.11 and 26.11.31 are approvable for the SIP. Because the Maryland regulation at COMAR 26.11.01.10 submitted for SIP approval does not specifically address substitution of other compliance methods or discontinuation of COMs at stationary sources, EPA provides no further response to Commenter’s concerns regarding compliance methodologies.

**Comment 2:** The Commenter expressed concern about attempts to weaken the opacity limits in the Maryland SIP and about State regulatory changes that created exemptions to the opacity limits. However, the Commenter acknowledged that the exceptions to the opacity limits are contained in COMAR 26.11.09.05 and COMAR 26.11.01.10(A)(4), both of which are not a part

of the SIP revision submittal that EPA proposed to approve in the NPR. Commenter acknowledged EPA's approval of the November 24, 2015 SIP submittal (as amended February 26, 2016) would not incorporate these "exceptions into the SIP."

**Response 2:** EPA thanks the Commenter for its acknowledgments. As the Commenter clearly stated, EPA's NPR does not propose action on any revised provisions in COMAR 26.11.09.05 nor propose any action on COMAR 26.11.01.10(A)(4), as MDE withdrew that provision from EPA's consideration with the February 26, 2016 supplemental letter. Thus, no further response is necessary to Commenter's statements.

### **III. Final Action**

Pursuant to section 110 of the CAA, EPA is approving for the Maryland SIP the revisions to requirements for COMs and CEMs in COMAR 26.11.01.01, COMAR 26.11.01.05 and COMAR 26.11.01.10, approving new provisions for COMs and CEMs at COMAR 26.11.01.11 and approving new requirements for quality assurance for CEMs at COMAR 26.11.31.

### **IV. Incorporation by Reference**

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the revised requirements for COMs and CEMs in COMAR 26.11.01.01, 26.11.01.05, 26.11.01.10, and 26.11.01.11 and QA/QC requirements for COMs in new regulation COMAR 26.11.31. Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference by the Director of the

Federal Register in the next update to the SIP compilation.<sup>2</sup> EPA has made, and will continue to make, these materials generally available through <http://www.regulations.gov> and/or at the EPA Region III Office (please contact the person identified in the “For Further Information Contact” section of this preamble for more information).

## **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);

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<sup>2</sup> 62 FR 27968 (May 22, 1997).

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

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

## **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 approving COMs and CEMs revisions to Maryland regulations 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, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Dated: September 29, 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 V--Maryland**

2. In § 52.1070, the table in paragraph (c) is amended by:

- a. Revising the entries for COMAR 26.11.01.01, COMAR 26.11.01.05, and COMAR 26.11.01.10; and
- b. Adding the entries COMAR 26.11.01.11 and COMAR 26.11.31.

The revisions and additions read as follows:

**§ 52.1070 Identification of plan.**

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(c) \* \* \*

**EPA-APPROVED REGULATIONS, TECHNICAL MEMORANDA, AND STATUTES IN THE MARYLAND SIP**

<b>Code of Maryland Administrative Regulations (COMAR) citation</b>	<b>Title/subject</b>	<b>State effective date</b>	<b>EPA approval date</b>	<b>Additional explanation/citation at 40 CFR 52.1100</b>
* * * * *				
<b>26.11.01 General Administrative Provisions</b>				
26.11.01.01	Definitions	5/17/2010	[Insert date of Federal Register publication] [Insert Federal Register citation]	New definition for COMs and clarify definition for CEMs
* * * * *				
26.11.01.05	Records and Information	5/17/2010	[Insert date of Federal Register publication] [Insert Federal	(c)(172) Administrative changes to reporting and recordkeeping

Code of Maryland Administrative Regulations (COMAR) citation	Title/subject	State effective date	EPA approval date	Additional explanation/citation at 40 CFR 52.1100
			<u>Register citation]</u>	requirements.
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26.11.01.10	Continuous Opacity Monitoring	8/22/2010	[ <u>Insert date of Federal Register publication]</u> [ <u>Insert Federal Register citation]</u>	(c)(106) Requirement to use TM 90-01 is removed. Exceptions: A(4), B(4), D(2)(c), and F.
26.11.01.11	Continuous Emissions Monitoring	8/22/2010	[ <u>Insert date of Federal Register publication]</u> [ <u>Insert Federal Register citation]</u>	
* * *	* * *	* * *	* * *	* * *
26.11.31	Quality Assurance Requirements for Opacity Monitors (COMs)	6/13/2011	[ <u>Insert date of Federal Register publication]</u> [ <u>Insert Federal Register citation]</u>	
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[FR Doc. 2016-26866 Filed: 11/4/2016 8:45 am; Publication Date: 11/7/2016]