



**6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R04-OAR-2013-0772; FRL-9960-94-Region 4]**

**Air Plan Approval; North Carolina;**

**Motor Vehicle Emissions Control Program; Correcting Amendment**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Direct final rule.

**SUMMARY:** This direct final action, taken under the authority of the Clean Air Act (CAA or Act), corrects an error in previously promulgated rules approving certain elements of the North Carolina state implementation plan (SIP). The error relates to the North Carolina SIP's Motor Vehicle Emissions Control Standard rules and the correction removes a provision of the State's otherwise federally-enforceable regulations that could result in infringement upon the sovereign immunity of Federal facilities. The intended effect is to ensure that the North Carolina SIP is correctly identified in the applicable part of the Code of Federal Regulations and to eliminate the possibility of such infringement.

**DATES:** This direct final rule is effective [Insert date 60 days after date of publication in the Federal Register] without further notice, unless EPA receives adverse comment by [Insert date 30 days after date of publication in the Federal Register]. If EPA receives such comments, it will

publish a timely withdrawal of the direct final rule in the Federal Register and inform the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R04-OAR-2013-0772 at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Kelly Sheckler, 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. Mrs. Sheckler can be reached via phone at (404) 562-9992 or electronic mail at [sheckler.kelly@epa.gov](mailto:sheckler.kelly@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Section 182(b)(4) of the CAA requires areas that are designated as moderate, serious, or severe ozone nonattainment to establish a motor vehicle inspection and maintenance (I/M) program to ensure that specified gasoline-fueled motor vehicles do not exceed prescribed emissions thresholds by requiring that vehicles undergo periodic emissions testing, including mandatory repairs for vehicles found to exceed these thresholds. This emissions testing ensures that vehicles are well maintained and operating as designed.

The North Carolina I/M program began in 1982 in Mecklenburg County utilizing a “tail-pipe” emissions test. From 1986 through 1991 the program expanded to include eight additional counties (Wake, Forsyth, Guilford, Durham, Gaston, Cabarrus, Orange and Union County). In 1999, the North Carolina General Assembly passed legislation to expand the coverage area for the I/M program in order to gain additional emission reductions to achieve the 1997 8-hour ozone national ambient air quality standards in the State. This legislation expanded the I/M program from nine counties to 48 counties by adding several counties approximately every six months from July 1, 2003, to July 1, 2006. The I/M program in the expanded coverage area used on-board diagnostic (OBD) rather than tail-pipe testing. On August 7, 2002, North Carolina submitted a SIP revision to amend the I/M regulations included in the SIP at that time to, among other things, expand the counties subject to the I/M program as discussed above, require OBD in the subject counties for all model year (MY) 1996 and newer light duty gasoline vehicles, and terminate the tail-pipe testing program on January 1, 2006, for the nine counties subject to continued tail-pipe testing of MY 1995 and older vehicles.

EPA approved these changes to North Carolina's I/M program into the SIP on October 30, 2002. *See* 67 FR 66056. North Carolina submitted additional SIP revisions related to the State's I/M program on January 31, 2008, May 24, 2010, October 11, 2013, and February 11, 2014. EPA approved North Carolina's January 31, 2008, May 24, 2010, October 11, 2013, and February 11, 2014, SIP revisions pertaining to state rule changes to the State's I/M program on February 5, 2015. *See* 80 FR 6455.

## **II. Error Correction**

The CAA sets forth requirements for Federal facilities which are located in I/M program areas. These requirements in section 118(c) and (d) apply to both Federal fleet and Federal employee vehicles. Congress intended in that section that Federal facilities located in I/M program areas demonstrate compliance with certain local and State I/M requirements. When EPA published the I/M rule in 1992, *see* 57 FR 52950, the Agency interpreted CAA section 118(c) and (d) as a partial waiver of the Federal government's sovereign immunity, thereby allowing States to regulate Federal facilities in their I/M programs.<sup>1</sup> Accordingly, EPA established certain SIP requirements for Federal facilities in the I/M rule. Since that time, the Department of Justice (DOJ) has found that sections 118(c) and (d) do not waive sovereign immunity for the Federal government and thus states are without authority to enforce the section 118(c) and (d) requirements for Federal facilities.<sup>2</sup> Further, DOJ found that the express waiver

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<sup>1</sup> *See* letter from Gay MacGregor, Director, Regional and State Programs Division, EPA Office of Air and Radiation, to Mary Jo Leugers, Virginia Office of the Attorney General (August 28, 1998) (MacGregor Letter).

<sup>2</sup> *See* letter from Lois J. Schiffer, Assistant Attorney General, Department of Justice Environment and Natural Resources Division, to Scott Fulton, Acting General Counsel, EPA (July 29, 1998) (Schiffer Letter).

of sovereign immunity in section 118(a) extends only to nondiscriminatory requirements (i.e., each agency and employee of the Federal government “shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity.”). As explained below, section 118(a)’s immunity waiver does not extend to State I/M requirements that, like the North Carolina provision at issue here, are imposed upon Federal entities in a different manner or to a different extent than nongovernmental entities.

North Carolina’s regulation 15A NCAC 02D.1002(a)(3) identifies vehicles that are operated on a Federal installation and that meet the requirements of 40 CFR 51.356(a)(4) as subject to the State motor vehicle emission standard. This North Carolina regulation thus subjects certain vehicles operated on Federal installations to State I/M requirements that do not apply in the same manner and to the same extent to nongovernmental entities, and it is inconsistent with the waiver of immunity in section 118(a). As noted in the MacGregor Letter addressing the issue, removing Federal facility I/M requirements from SIPs will in no way impact the emissions reductions credits the States earn for their I/M programs; pursuant to section 118(a), Federal agencies are required to comply with air pollution control programs to the same extent as nongovernmental entities and thus will continue to be subject to programs of general applicability. EPA is therefore removing from the federally-approved North Carolina SIP regulation 15A NCAC 02D.1002(a)(3) because that regulation does not apply to vehicles operated on Federal installations in the same manner and to the same extent as vehicles owned or operated by nongovernmental entities.

### **III. Final Action**

Pursuant to CAA section 110(k)(6), EPA rescinds its previous approval of NCAC 02D.1002(a)(3), a provision that sets forth additional requirements under the vehicle I/M program for motor vehicles operated on Federal installations that do not apply to nongovernmental entities and thus is inconsistent with CAA section 118(a). This action will not result in increases in emissions that would interfere with attainment or maintenance of any NAAQS or with any other applicable requirement of the CAA.

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

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a “significant regulatory action” and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely corrects North Carolina’s EPA-approved SIP by removing the State’s regulation 15A NCAC 02D.1002 (a)(3), which listed Federal facilities as applicable to the state motor vehicle emission standard and 40 CFR 51.356(a)(4), by removing it from the federally-approved portion of the North Carolina SIP to be consistent with CAA 118. It imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Furthermore, this action 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).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This rule also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule merely removes North Carolina regulation 15A NCAC 02D.1002 (a)(3) from the federally approved portion of the North Carolina SIP to be consistent with CAA 118; it also does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), because it is not economically significant. In addition, this rule does not involve technical standards, thus the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule also does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. section 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 rule 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. section 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[insert date 60 days after date of publication of this document in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* CAA section 307(b)(2).

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

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by Reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 15, 2017

V. Anne Heard,  
Acting Regional Administrator,  
Region 4.

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 II – North Carolina**

2. Section 52.1770(c) is amended by revising the entry for “Sect .1002” to read as follows:

**§ 52.1770 Identification of plan.**

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(c)\* \* \*

**TABLE 1 – EPA APPROVED NORTH CAROLINA REGULATIONS**

<b>State</b>	<b>Title/subject</b>	<b>State effective</b>	<b>EPA approval</b>	<b>Explanation</b>
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<b>citation</b>		<b>date</b>	<b>date</b>	
<b>Subchapter 2D Air Pollution Control Requirements</b>				
**	**	*	*	*
<b>Section .1000 Motor Vehicle Emissions Control Standards</b>				
**	**	*	*	*
Sect .1002	Applicability	1/1/2014	[Insert date of publication in <u>Federal Register</u> [Insert Federal Register citation]	Paragraph (a)(3) of Section .1002 is hereby rescinded as this paragraph is inconsistent with the limits on the waiver of sovereign immunity established in section 118(a) of the CAA.
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