



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2017-0601; FRL-9977-42-Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Regional Haze Plan and Visibility for the 2010 Sulfur Dioxide and 2012 Fine Particulate Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; supplemental.

SUMMARY: The Environmental Protection Agency (EPA) is issuing a supplement to its March 1, 2018 proposed approval of the Commonwealth of Virginia's (the Commonwealth or Virginia) request to change reliance on the Clean Air Interstate Rule (CAIR) to reliance on the Cross-State Air Pollution Rule (CSAPR) to address certain regional haze requirements and to convert the Agency's limited approval/limited disapproval of Virginia's regional haze SIP to a full approval. EPA's March 1, 2018 notice of proposed rulemaking (NPR) also proposed to approve the "visibility element" of Virginia's infrastructure SIP submittals for the 2010 sulfur dioxide (SO₂) and 2012 fine particulate matter (PM_{2.5}) national ambient air quality standards (NAAQS). This supplemental proposal clarifies the infrastructure elements the Agency is proposing to approve for the 2010 SO₂ National Ambient Air Quality Standards (NAAQS) and proposes to remove EPA's June 7, 2012 federal implementation plan (FIP) for Virginia which replaced reliance on CAIR with reliance on CSAPR to address certain deficient regional haze requirements identified in the Commonwealth's regional haze state implementation plan (SIP). EPA is seeking comment only on the issues raised in this supplemental proposal and is not reopening for comment other issues raised in its prior proposal. This action is being taken under

the Clean Air Act (CAA).

DATES: Written comments must be received on or before **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R03-OAR-2017-0601 at <http://www.regulations.gov>, or via email to spielberger.susan@epa.gov. For comments submitted at [Regulations.gov](http://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](http://www.regulations.gov). For either manner of submission, 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, please contact the person identified in the “For Further Information Contact” section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

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

SUPPLEMENTARY INFORMATION:

I. Background

On July 16, 2015, the Virginia Department of Environmental Quality (VA DEQ) submitted a revision to the Virginia SIP to update its regional haze plan to change reliance from CAIR to CSAPR and to meet visibility requirements in section 110(a)(2)(D) of the CAA. On March 1, 2018 (83 FR 8814), EPA published a notice of proposed rulemaking (March 1, 2018 NPR) proposing to take the following actions: 1) Approve Virginia's July 16, 2015 SIP submission that changes reliance on CAIR to reliance on CSAPR for certain elements of Virginia's regional haze program; 2) convert EPA's limited approval/limited disapproval of Virginia's regional haze program to a full approval; and 3) approve the prong 4 portions of Virginia's June 18, 2014 infrastructure SIP submission for the 2010 SO₂ NAAQS and of its July 16, 2015 infrastructure SIP submission for the 2012 PM_{2.5} NAAQS. EPA is not reopening the public comment period to submit comment on the issues addressed in the March 1, 2018 NPR.

II. Specific Issues Addressed in this Supplemental NPR

Removal of Partial Regional Haze FIP

On June 7, 2012, EPA finalized a limited approval and a limited disapproval of several SIP revisions submitted by VA DEQ meant to address regional haze program requirements.¹ The limited disapproval of these SIP revisions was based upon Virginia's reliance on CAIR as an alternative to best available retrofit technology (BART) and as a measure for reasonable progress. To address deficiencies in CAIR-dependent regional haze SIPs for several states, including Virginia, EPA promulgated FIPs that replace reliance on CAIR with reliance on CSAPR to meet BART and reasonable progress requirements in Virginia and other states in that same action. Consequently, for these states, this particular aspect of their regional haze

¹ 77 FR 33643. Virginia's SIP revisions are dated July 17, 2008, March 6, 2009, January 14, 2010, October 4, 2010, November 19, 2010, and May 6, 2011.

requirements was satisfied by a FIP (hereafter referred to as partial RH FIP). On July 16, 2015, the Commonwealth of Virginia submitted a SIP revision changing its reliance from CAIR to CSAPR in its SIP to meet BART for visibility purposes and for addressing reasonable progress requirements, thereby removing Virginia's need for the partial RH FIP.

In its March 1, 2018 NPR, EPA proposed to approve the July 16, 2015 SIP revision which would change Virginia's reliance upon CAIR to reliance upon CSAPR for the BART and reasonable progress elements of Virginia's regional haze program. EPA also proposed to convert EPA's limited approval/limited disapproval of Virginia's regional haze program to a full approval based on Virginia's SIP revision changing reliance upon CAIR to reliance upon CSAPR. In this action, EPA proposes to remove the Agency's partial RH FIP for Virginia which replaced reliance on CAIR with reliance on CSAPR to address certain deficient regional haze requirements identified in the Commonwealth's regional haze SIP. EPA's proposed action to remove this FIP for Virginia is in accordance with section 110(l) of the CAA and will not impact any regional requirements as Virginia will have, when this action is final, a fully approved regional haze program and the ability to rely on CSAPR for certain regional haze requirements, incorporated in its SIP.

Section 110(a)(2)(J) Visibility Requirement

The CAA requires states to submit, within three years after promulgation of a new or revised NAAQS, SIP revisions meeting the applicable elements of sections 110(a)(1) and (2). SIP revisions that are intended to meet the requirements of section 110(a) of the CAA are often referred to as infrastructure SIPs and the elements under 110(a) are referred to as infrastructure requirements. EPA acted on the majority of the infrastructure elements within Virginia's

infrastructure SIP submittals for the 2010 SO₂ and 2012 PM_{2.5} NAAQS, but concluded that it would take separate action on 110(a)(2)(J) for visibility for 2010 SO₂ as well as on 110(a)(2)(D)(i)(II) for visibility (also known as prong 4) for both the 2010 SO₂ and 2012 PM_{2.5}.^{2,3}

In its March 1, 2018 NPR, EPA proposed to approve prong 4 for both the 2010 SO₂ and 2012 PM_{2.5} NAAQS,⁴ however the Agency did not address section 110(a)(2)(J) of the CAA as it relates to visibility protection. For this section, EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the CAA. In the event of the establishment of a new NAAQS, the visibility and regional haze program requirements under part C do not change. Therefore, when EPA took action on Virginia's infrastructure SIP submittal for the 2010 SO₂ NAAQS,⁵ the Agency could have approved 110(a)(2)(J) for visibility; however, it inadvertently neglected to do so at that time. EPA is now taking action to remedy this unintentional omission by proposing approval of Virginia's June 18, 2014 infrastructure SIP submittal for the 2010 SO₂ NAAQS specifically for section 110(a)(2)(J) for visibility as well as for prong 4 which we proposed for approval on March 1, 2018.

EPA is soliciting comments on the specific issues discussed in this document referring to the proposed: 1). Removal of the partial regional haze FIP which replaced reliance on CAIR with

² On March 4, 2015 (80 FR 11557), EPA approved portions of Virginia's June 18, 2014 submittal for the 2010 SO₂ NAAQS addressing the following: CAA section 110(a)(2)(A), (B), (C), (D)(i)(II) for prevention of significant deterioration, (D)(ii), (E), (F), (G), (H), (J) (consultation, public notification, and prevention of significant deterioration), (K), (L), and (M).

³ On June 16, 2016 (81 FR 39208), EPA approved portions of Virginia's July 16, 2015 submittal for the 2012 PM_{2.5} NAAQS addressing the following: CAA section 110(a)(2)(A), (B), (C), (D)(i)(II) for prevention of significant deterioration, (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).

⁴ In its analysis for the March 1, 2018 NPR, EPA proposed to find that if revisions to the Commonwealth's regional haze SIP were fully approved, then the prong 4 portions of Virginia's infrastructure SIP submittal for the 2010 SO₂ and 2012 PM_{2.5} NAAQS meet applicable requirements of the CAA.

⁵ See 80 FR 11557. (approving Virginia's June 18, 2014 submittal for the 2010 SO₂ NAAQS for CAA section 110(a)(2)(A), (B), (C), (D)(i)(II) for prevention of significant deterioration, (D)(ii), (E), (F), (G), (H), (J) (consultation, public notification, and prevention of significant deterioration), (K), (L), and (M)).

reliance on CSPAR to address certain regional haze requirements as finalizing our March 1, 2018 NPR will give Virginia's regional haze SIP full approval; and 2). approval of Virginia's June 18, 2014 infrastructure SIP submittal for the 2010 SO₂ NAAQS section 110(a)(2)(J) for visibility (in addition to approval for 110(a)(2)(D)(i)(II)). These comments and those received during the comment period for the March 1, 2018 NPR will be considered before taking final action.

III. Proposed Action

EPA is proposing removal of the partial regional haze FIP which replaced reliance on CAIR with reliance on CSPAR to address certain regional haze requirements and approval of Virginia's June 18, 2014 infrastructure SIP submittal for the 2010 SO₂ NAAQS for section 110(a)(2)(J) for visibility.

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 regional haze 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

Additional information about these statutes and Executive Orders can be found at

<http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

- Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review. This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.
- Paperwork Reduction Act (PRA). This action does not impose an information collection burden under the PRA. Therefore, its recordkeeping and reporting provisions do not constitute a “collection of information” as defined under 44 U.S.C. 3502(3) and 5 CFR 1320.3(c).

- Regulatory Flexibility Act (RFA). This action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities.
- Unfunded Mandates Reform Act (UMRA). This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments.
- Executive Order 13132: Federalism. This action does not have federalism implications. It will 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.
- Executive Order 13175: Consultation and Coordination with Indian Tribal Governments. This action does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on any 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. Thus, Executive Order 13175 does not apply to this action.
- Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks. EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the

Executive Order. This action is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045

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).

In addition, pursuant to CAA section 307(d)(1)(B), EPA proposes to determine that this action is subject to the provisions of section 307(d). Section 307(d) establishes procedural requirements specific to certain rulemaking actions under the CAA. Pursuant to CAA section 307(d)(1)(B), the withdrawal of the provisions of the Virginia regional haze regional FIP that apply to changing reliance on CAIR to reliance on CSAPR to address certain deficient regional haze requirements is subject to the requirements of CAA section 307(d), as it constitutes a revision to a FIP under section 110(c) of the CAA. Furthermore, section 307(d)(1)(V) of the CAA provides that the provisions of section 307(d) apply to “such other actions as the Administrator may determine.” EPA proposes that the provisions of 307(d) apply to EPA's action on the Virginia SIP revision.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

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

Dated: April 19, 2018.

Cosmo Servidio,
Regional Administrator,
Region III.

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