



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2017-0642; FRL-9980-50-Region 4]

Air Plan Approval; AL; Section 128 Board Requirements for Infrastructure SIPs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a State Implementation Plan (SIP) submission, submitted by the State of Alabama, through the Alabama Department of Environmental Management (ADEM), on October 24, 2017, and a portion of a December 9, 2015, infrastructure SIP submission. The October 24, 2017 submission addresses the general Clean Air Act (CAA or Act) conflict of interest requirements applicable to Alabama state boards or agency personnel with respect to the approval of permits or enforcement orders. This submission also specifically addresses requirements for implementation of the following national ambient air quality standards (NAAQS): 1997, 2006, and 2012 Fine Particulate Matter (PM_{2.5}), 2008 8-hour Ozone, 2008 Lead, 2010 Nitrogen Dioxide (NO₂), and 2010 Sulfur Dioxide (SO₂). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance and enforcement of each NAAQS promulgated by EPA.

Whenever EPA promulgates a new or revised NAAQS, the CAA requires the state to make a new SIP submission establishing that the existing SIP meets the various applicable requirements, or revising the SIP to meet those requirements. This type of SIP submission is commonly referred to as an “infrastructure” SIP. In this action, EPA is approving the October 24, 2017, submission with respect to: the CAA conflict of interest requirements; and the related conflict of

interest infrastructure SIP requirements for the 1997, 2006, and 2012 PM_{2.5}, 2008 8-hour Ozone, 2008 Lead, 2010 NO₂, and 2010 SO₂ NAAQS. In addition, EPA is approving a portion of ADEM's December 9, 2015, infrastructure SIP submission (as supplemented by the October 24, 2017 submission) related to the conflict of interest requirements for the 2012 PM_{2.5} NAAQS. This action removes EPA's obligation to promulgate a Federal Implementation Plan (FIP) to address these CAA state board requirements for Alabama.

DATES: This rule will be effective [**Insert date 30 days after date of publication in the Federal Register**].

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2017-0642. All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information 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 through 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: Nacosta C. Ward, 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. The telephone number is (404) 562-9140. Ms. Ward can be reached via electronic mail at ward.nacosta@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

States must submit infrastructure SIP submissions meeting the applicable requirements of sections 110(a)(1) and (2) of the CAA within three years after EPA’s promulgation of a new or revised NAAQS. Sections 110(a)(1) and (2) require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the new or revised NAAQS. More specifically, section 110(a)(1) provides the procedural and timing requirements for infrastructure SIP submissions. Section 110(a)(2) lists specific requirements that states must meet for “infrastructure” SIP purposes, as applicable, related to the newly established or revised NAAQS. In particular, section 110(a)(2)(E)(ii) requires states to include provisions in their SIP to address the state board requirements of section 128.

EPA is finalizing its proposed approval of Alabama’s December 9, 2015 and October 24, 2017,¹ submissions to incorporate into its SIP certain regulatory provisions to address the state board requirements of section 128. As a result of the addition of these new SIP provisions to meet the requirements of section 128, EPA is also finalizing approval of these submissions as satisfying the section 110(a)(2)(E)(ii) infrastructure requirement for the 1997, 2006, and 2012

¹ Alabama’s October 24, 2017 submission became state effective on December 8, 2017.

PM_{2.5}, 2008 8-hour Ozone, 2008 Lead, 2010 NO₂, and 2010 SO₂ NAAQS. This final action fully addresses the SIP deficiencies related to section 110(a)(2)(E)(ii) and section 128 from EPA's prior disapprovals of infrastructure SIP submissions for the 1997 and 2006 PM_{2.5} NAAQS on October 15, 2012 (77 FR 62449), 2008 8-hour Ozone NAAQS on April 2, 2015 (80 FR 17689), 2008 Lead NAAQS on October 9, 2015 (80 FR 61111), 2010 NO₂ NAAQS on November 21, 2016 (81 FR 83142), and 2010 SO₂ NAAQS on January 12, 2017 (82 FR 3637). Thus, this final action also satisfies EPA's FIP obligation with regard to that infrastructure SIP requirement for these NAAQS based on the prior disapprovals.

EPA proposed to approve Alabama's October 24, 2017, submission related to the state board requirements as meeting the requirements of section 128, and also as meeting the infrastructure requirements of section 110(a)(2)(E)(ii) for the 1997 and 2006 PM_{2.5}, 2008 8-hour Ozone, 2008 Lead, 2010 NO₂, and 2010 SO₂ NAAQS and a portion of the December 9, 2015, infrastructure SIP submission related to the state board requirements for the 2012 PM_{2.5} NAAQS in a notice of proposed rulemaking (NPR) published on February 8, 2018 (83 FR 5594). The details of Alabama's submissions and the rationale for EPA's actions related to how Alabama addressed the requirements of section 128 and the related infrastructure section 110(a)(2)(E)(ii) requirements for the aforementioned NAAQS are explained in the NPR.

II. Response to Comments

EPA received a total of nine sets of comments, but only one commenter submitted comments that are relevant to this action.

Comment 1: The Commenter contends that Alabama's new provisions related to conflicts of interest do not fully comply with the CAA section 128 because the provisions apply to the

members of applicable boards or bodies, rather than to the board or body itself. Specifically, the Commenter states: “because the 128(a)(1) applies to the board itself but [Alabama Rule] 335-1-1-.03(1)(h) does not apply to the board itself, but rather to its members, 335-1-1-.03(1)(h) does not meet the requirement of 128(a)(1).” The Commenter contends that this raises concerns about the enforceability of this provision. The Commenter expresses concern that it could not name the board itself as a defendant because the provision does not apply to the board, and that it could be difficult to enforce the conflict of interest provisions against individual board members because the members each could assert they are not the majority. The Commenter also expresses concern about remedies in such an enforcement action, contending that a “U.S. District Judge would have to decide which members to remove from the board.” Therefore, the Commenter suggested that EPA should only conditionally approve the SIP submissions—specifically, that EPA approve the submissions on the condition that the state revise 335-1-1-.03(1)(h) so that it applies to the Alabama Environmental Management Commission (EMC) as a collective entity, rather than to the individual members of the EMC.

EPA’s Response 1: EPA does not agree with the Commenter that Alabama Rule 335-1-1-.03(2)(h)² does not satisfy the requirements of section 128(a)(1) because the provision applies to each individual member of the board or body, rather than to the board or body itself as a whole. Section 128(a)(1) requires SIPs to (a) “contain requirements that (1) any board or body which approves permits or enforcement orders under [the CAA] shall have at least a majority of members who represent the public interest and do not derive any significant portion of income

² The Commenter provided a citation to Alabama rule 335-1-1-.03(1)(h) in its comments, but the SIP submission requests incorporation of Alabama rule 335-1-1-.03(2)(h). EPA notes that Alabama rule 335-1-1-.03 does not include a (1)(h), and believes the Commenter’s citation was in error. EPA is, therefore, citing to 335-1-1-.03(2)(h) in its responses to the comments.

from persons subject to permits or enforcement orders under [the CAA].” Upon approval, the Alabama SIP will contain requirements to ensure that the EMC will have at least a majority of members who represent the public interest and who do not derive a significant portion of income from regulated entities, and that all of the members of the EMC will disclose any potential conflicts of interest. This is because the EMC is made up of the members themselves (there is no separate governing board or body) and because each member will be responsible for meeting all requirements of section 128, including the majority requirements of section 128(a)(1). By electing to make each individual member of the EMC directly responsible for compliance with section 128 requirements, Alabama has assured that the EMC as a whole will meet these requirements.

Further, EPA notes that the CAA does not explicitly require that the provisions of section 128(a)(1) apply directly to a board or body itself as a distinct entity. Ultimately, the requirements of this provisions are met if a majority of board members meet the public-interest and significant-portion-of-income requirements. In fact, as noted in the notice of proposed approval, 83 FR 5597, states have some flexibility to determine the specific provisions needed to satisfy the requirements of section 128, so long as the statutory requirements are met.^{3,4} In this instance, Alabama determined that requiring each member of the board to meet the requirements of section 128(a)(1) is an appropriate means to assure that the EMC as a whole meets the

³ The U.S. House of Representative conference committee report for the 1977 amendments stated that “it is the responsibility of each state to determine the specific requirements to meet the general requirements of [section 128].” H.R. Rep. 95-564 (1977), reprinted in *Legislative History of the Clean Air Act Amendments of 1977*, 526-527 (1978).

⁴ In guidance, EPA has recognized that states may have a variety of procedures and special concerns that may warrant differing approaches to implementation of section 128. “Guidance to States for Meeting Conflict of Interest Requirements of Section 128,” Memorandum from David O. Bickart, Deputy General Counsel, to Regional Air Directors, March 2, 1978 (“1978 Guidance”).

substantive requirements. Thus, EPA believes Alabama's approach satisfies the majority composition requirements of section 128(a)(1), about which the commenter expressed concern, and does not require any amendment.

The Commenter also expresses concern about potential difficulties with pursuing citizen suits as a basis for suggesting that Rule 335-1-1-.03(2)(h) is not enforceable. Specifically, the Commenter suggests that it would be unable to name the board itself as a defendant, then posits that individual board members could say they are not the majority, and concludes that a "U.S. District Judge would have to decide which members to remove from the board." EPA does not agree that being unable to seek enforcement against the board itself versus the individual members will preclude enforcement of the requirements in the event of potential noncompliance. EPA does not believe that Rule 335-1-1-.03(2)(h) presents unique enforcement challenges or that requiring compliance by each member of the EMC, rather than the EMC itself, eliminates the opportunity for judicial review for non-compliance. In particular, the EPA does not agree that the only remedy available to a federal district court is for the court to decide which members to remove from the board. For example, the court could direct board members to comply with the section 128 requirements.

Comment 2: The Commenter also expresses concerns "with regard to CAA 128(a)(2)'s obligation to adequately disclose potential conflicts of interest, [Rule] 335-1-1-.03(1)(h) and [Rule] 335-1-1-.04(6)'s lack of any specifics as to what constitutes adequate disclosure can lead to confusion and potential lengthy litigation."

EPA's Response 2: EPA does not agree that omitting an explicit regulatory definition or other specification of what constitutes adequate disclosure is impermissible. EPA notes that the CAA itself does not define what constitutes "adequately" disclosing potential conflicts of interest.

This means that what constitutes adequate disclosure may depend upon the specific facts and circumstances of a given situation. While EPA’s 1978 guidance provides a recommended definition for “adequately disclosed,” this guidance also specifies that it does not create a requirement that all SIPs must include EPA’s suggested definitions verbatim, or that states must include any definitions in SIPs at all.⁵ As noted in the proposed action, EPA has approved similar state law requirements for other states that closely track or mirror the explicit statutory language of section 128, and which do not define “adequately disclosed.”⁶ Nevertheless, EPA concludes that by requiring each member of the EMC and the management of ADEM to comply with applicable federal law and regulations, those individuals are required to disclose any potential conflicts of interest adequately. The determination of whether they have done so will turn upon the specific facts and circumstances of a given situation, per the explicit requirement of section 128(a)(2). Because Alabama’s SIP revision meets CAA requirements and is consistent with EPA guidance and past approvals with respect to the requirements of section 128, EPA believes that state does not need to make the revisions suggested by the Commenter.

III. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of ADEM’s Section 335-1-1-.03, *Organization and Duties of the Commission* and Section 335-1-1-.04, *Organization of the Department*, state effective December 8, 2017, which revise Alabama’s SIP to include language that mandates members of the Alabama Environmental Management Commission and the ADEM Director, Deputy Director, Division Chiefs, and all ADEM

⁵ 1978 Guidance, “Model Letter from Regional Offices to States,” at 2-3.

⁶ See also EPA proposed rule on South Dakota, 79 FR 71040, 71052, finalized at 80 FR 4799.

personnel meet all requirements of the state ethics law and the conflict of interest provisions of applicable Federal laws and regulations. EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 4 Office (please contact the person identified in the “For Further Information Contact” section of this preamble for more information). 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 in the next update to the SIP compilation.⁷

IV. Final Action

As described above, EPA is taking action to approve SIP revisions needed to assure that Alabama’s SIP meets the state board requirements of section 128 of the CAA. Approval of Alabama’s October 24, 2017 SIP submission, and a portion of the December 9, 2015 SIP submission also meets the section 110(a)(2)(E)(ii) infrastructure SIP requirements for the 1997, 2006, and 2012 PM_{2.5}, 2008 8-hour Ozone, 2008 Lead, 2010 NO₂, and 2010 SO₂ NAAQS. With this approval, the deficiencies that EPA identified in the previous partial disapprovals of Alabama’s infrastructure SIP submissions related to the state board requirements for the 1997 and 2006 PM_{2.5}, 2008 8-hour Ozone, 2008 Lead, 2010 NO₂, and 2010 SO₂ NAAQS are resolved.

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

⁷ 62 FR 27968 (May 22, 1997).

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. 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);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- 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.

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).

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 from 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 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 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, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: June 25, 2018.

Onis “Trey” Glenn, III

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 B – Alabama

2. Section 52.50 is amended by:

- a. In paragraph (c), adding a new heading for “Chapter No. 335-1-1 Organization” and adding new entries for “Section 335-1-1-.03,” and “Section 335-1-1-.04” at the beginning of the table; and
- b. In paragraph (e), adding new entries for “110(a)(1) and (2) Infrastructure Requirements for the 1997 Annual PM_{2.5} NAAQS,” “110(a)(1) and (2) Infrastructure Requirements for the 2006 24-hour PM_{2.5} NAAQS,” “110(a)(1) and (2) Infrastructure Requirements for the 2012 24-hour PM_{2.5} NAAQS,” “110(a)(1) and (2) Infrastructure Requirements for the 2008 Lead NAAQS,” “110(a)(1) and (2) Infrastructure Requirements for the 2008 8-hour Ozone NAAQS,” “110(a)(1) and (2) Infrastructure Requirements for the 2010 NO₂ NAAQS,” and “110(a)(1) and (2) Infrastructure Requirements for the 2010 SO₂ NAAQS” at the end of the table to read as follows:

§52.50 Identification of plan.

* * * * *

(c) * * *

EPA Approved Alabama Regulations

| State citation | Title/subject | State effective date | EPA approval date | Explanation |
|----------------------------------|---|----------------------|---|-------------|
| Chapter No. 335-1-1 Organization | | | | |
| Section 335-1-1-.03 | Organization and Duties of the Commission | 12/8/2017 | [Insert date of publication in <u>Federal Register</u>], [Insert citation of publication] | |
| Section 335-1-1-.04 | Organization of the Department | 12/8/2017 | [Insert date of publication in <u>Federal Register</u>], [Insert citation of publication] | |
| * * | * * | * | * | * |

(e) * * *

EPA-Approved Alabama Non-Regulatory Provisions

| Name of nonregulatory SIP provision | Applicable geographic or nonattainment area | State submittal date/effective date | EPA approval date | Explanation |
|---|---|-------------------------------------|---|---|
| ** | ** | * | * | * |
| 110(a)(1) and (2) Infrastructure Requirements for the 1997 Annual PM _{2.5} NAAQS | Alabama | 12/8/2017 | [Insert date of publication in <u>Federal Register</u>], [Insert citation of publication] | Addressing the state board requirements of sections 128 and 110(a)(2)(E)(ii) only |

| | | | | |
|---|---------|-----------|---|---|
| 110(a)(1) and (2) Infrastructure Requirements for the 2006 24-hour PM _{2.5} NAAQS | Alabama | 12/8/2017 | [Insert date of publication in <u>Federal Register</u>], [Insert citation of publication] | Addressing the state board requirements of sections 128 and 110(a)(2)(E)(ii) only |
| 110(a)(1) and (2) Infrastructure Requirements for the 2012 24-hour PM _{2.5} NAAQS | Alabama | 12/8/2017 | [Insert date of publication in <u>Federal Register</u>], [Insert citation of publication] | Addressing the state board requirements of sections 128 and 110(a)(2)(E)(ii) only |
| 110(a)(1) and (2) Infrastructure Requirements for the 2008 Lead NAAQS | Alabama | 12/8/2017 | [Insert date of publication in <u>Federal Register</u>], [Insert citation of publication] | Addressing the state board requirements of sections 128 and 110(a)(2)(E)(ii) only |
| 110(a)(1) and (2) Infrastructure Requirements for the 2008 8-hour Ozone NAAQS | Alabama | 12/8/2017 | [Insert date of publication in <u>Federal Register</u>], [Insert citation of publication] | Addressing the state board requirements of sections 128 and 110(a)(2)(E)(ii) only |
| 110(a)(1) and (2) Infrastructure Requirements for the 2010 NO ₂ NAAQS | Alabama | 12/8/2017 | [Insert date of publication in <u>Federal Register</u>], [Insert citation of publication] | Addressing the state board requirements of sections 128 and 110(a)(2)(E)(ii) only |
| 110(a)(1) and (2) Infrastructure Requirements for the 2010 SO ₂ NAAQS | Alabama | 12/8/2017 | [Insert date of publication in <u>Federal Register</u>], [Insert citation of publication] | Addressing the state board requirements of sections 128 and 110(a)(2)(E)(ii) only |

§ 52.53 [Amended]

3. Section 52.53 is amended by removing paragraphs (a) through (e).

[FR Doc. 2018-14525 Filed: 7/5/2018 8:45 am; Publication Date: 7/6/2018]