



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2018-0754; FRL-9990-98-Region 3]

**Approval and Promulgation of Air Quality Implementation Plans;
District of Columbia; Nonattainment New Source Review Requirements for 2008 8-Hour
Ozone Standard**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to the District of Columbia's state implementation plan (SIP). The revision is in response to EPA's February 3, 2017 Findings of Failure to Submit for various requirements relating to the 2008 8-hour ozone national ambient air quality standards (NAAQS). This SIP revision is specific to nonattainment new source review (NNSR) requirements. 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-2018-0754 at <http://www.regulations.gov>, or via email to maldonado.zelma@epa.gov. For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from 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: Amy Johansen, (215) 814-2156, or by e-mail at johansen.amy@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On May 23, 2018, the Department of Energy and Environment (DOEE) submitted on behalf of the District of Columbia (District) a formal SIP revision, requesting EPA’s approval of its NNSR Certification for the 2008 8-hour ozone NAAQS. This SIP revision is in response to EPA’s final 2008 8-hour ozone NAAQS Findings of Failure to Submit for NNSR requirements. *See* 82 FR 9158 (February 3, 2017). Specifically, the District is certifying that its existing NNSR program, covering the District portion of the Washington, DC-MD-VA Nonattainment Area (Washington Area) for the 2008 8-hour ozone NAAQS, is at least as stringent as the requirements at 40 CFR 51.165, as amended by the final rule titled “Implementation of the 2008 National Ambient Air

Quality Standards for Ozone: State Implementation Plan Requirements” (SIP Requirements Rule), for ozone and its precursors.^{1,2} See 80 FR 12264 (March 6, 2015).

A. 2008 8-Hour Ozone NAAQS

On March 12, 2008, EPA promulgated a revised 8-hour ozone NAAQS of 0.075 parts per million (ppm). See 73 FR 16436 (March 27, 2008). Under EPA’s regulations at 40 CFR 50.15, the 2008 8-hour ozone NAAQS is attained when the three-year average of the annual fourth-highest daily maximum 8-hour average ambient air quality ozone concentration is less than or equal to 0.075 ppm.

Upon promulgation of a new or revised NAAQS, the CAA requires EPA to designate as nonattainment any area that is violating the NAAQS based on the three most recent years of ambient air quality data at the conclusion of the designation process. The Washington Area was classified as marginal nonattainment for the 2008 8-hour ozone NAAQS on May 21, 2012 (effective July 20, 2012) using 2008-2010 ambient air quality data. See 77 FR 30088. On March 6, 2015, EPA issued the final SIP Requirements Rule, which establishes the requirements that state, tribal, and local air quality management agencies must meet as they develop implementation plans for areas where air quality exceeds the 2008 8-hour ozone NAAQS. See 80 FR 12264. Areas that were designated as marginal ozone nonattainment areas were required

¹ The SIP Requirements Rule addresses a range of nonattainment area SIP requirements for the 2008 8-hour ozone NAAQS, including requirements pertaining to attainment demonstrations, reasonable further progress (RFP), reasonably available control technology, reasonably available control measures, major new source review, emission inventories, and the timing of SIP submissions and of compliance with emission control measures in the SIP. The rule also revokes the 1997 ozone NAAQS and establishes anti-backsliding requirements.

² On February 16, 2018, the United States Court of Appeals for the District of Columbia Circuit (D.C. Cir. Court of Court) issued an opinion on the EPA’s SIP Requirements Rule. *South Coast Air Quality Mgmt. Dist. v. EPA*, 882 F.3d 1138, 2018 U.S. App.LEXIS 3636 (D.C. Cir. Feb. 16, 2018). The D.C. Cir. Court found certain provisions from the SIP Requirements Rule to be inconsistent with the statute or unreasonable and vacated those provisions. *Id.* The Court found other parts of the SIP Requirements Rule unrelated to this action reasonable and denied the petition for appeal on those provisions. *Id.*

to attain the 2008 8-hour ozone NAAQS no later than July 20, 2015, based on 2012-2014 monitoring data. *See* 40 CFR 51.1103. The Washington Area did not attain the 2008 8-hour ozone NAAQS by July 20, 2015; however, the area did meet the CAA section 181(a)(5) criteria, as interpreted in 40 CFR 51.1107, for a one-year attainment date extension. *See* 81 FR 26697 (May 4, 2016). Therefore, on April 11, 2016, the EPA Administrator signed a final rule extending the Washington Area 8-hour ozone NAAQS attainment date from July 20, 2015 to July 20, 2016. *Id.*³

Based on initial nonattainment designations for the 2008 8-hour ozone NAAQS, as well as the March 6, 2015 final SIP Requirements Rule, the District was required to develop a SIP revision addressing certain CAA requirements for the Washington Area, and submit to EPA a NNSR Certification SIP or SIP revision no later than 36 months after the effective date of area designations for the 2008 8-hour ozone NAAQS (i.e., July 20, 2015).⁴ *See* 80 FR 12264 (March 6, 2015). EPA is proposing to approve the District's May 23, 2018 NNSR Certification SIP revision. EPA's analysis of how this SIP revision addresses the NNSR requirements for the 2008 8-hour ozone NAAQS is provided in Section II below.

B. 2017 Findings of Failure to Submit SIP for the 2008 8-Hour Ozone NAAQS

Areas designated nonattainment for the ozone NAAQS are subject to the general nonattainment area planning requirements of CAA section 172 and also to the ozone-specific planning

³ EPA approved a Determination of Attainment (DOA) for the 2008 8-hour ozone NAAQS for the Washington Area. This action was based on complete, certified, and quality assured ambient air quality monitoring data for the 2013-2015 monitoring period. *See* 82 FR 52651 (November 14, 2017). It should be noted that a DOA does not alleviate the need for the District to certify that their existing SIP approved NNSR program is as stringent as the requirements at 40 CFR 51.165, as NNSR applies in nonattainment areas until an area has been redesignated to attainment.

⁴ Neither the District's obligation to submit the NNSR Certification SIP nor the requirements governing that submission were affected by the D.C. Circuit's February 16, 2018 decision on portions of the SIP Requirements Rule in *South Coast Air Quality Mgmt. Dist. v. EPA*.

requirements of CAA section 182.⁵ States in the ozone transport region (OTR), such as the District, are additionally subject to the requirements outlined in CAA section 184.

Ozone nonattainment areas in the lower classification levels have fewer and/or less stringent mandatory air quality planning and control requirements than those in higher classifications. For marginal areas, such as the Washington Area, a state is required to submit a baseline emissions inventory, adopt a SIP requiring emissions statements from stationary sources, and implement a NNSR program for the relevant ozone standard. *See* CAA section 182(a). For each higher ozone nonattainment classification, a state needs to comply with all lower area classification requirements, plus additional emissions controls and more expansive NNSR offset requirements.

The CAA sets out specific requirements for states in the OTR.⁶ Upon promulgation of the 2008 8-hour ozone NAAQS, states in the OTR were required to submit a SIP revision addressing reasonable available control technology (RACT). *See* 40 CFR 51.1116. This requirement is the only recurring obligation for an OTR state upon revision of a NAAQS, unless that state also contains some portion of a nonattainment area for the revised NAAQS.⁷ In that case, the nonattainment requirements described previously also apply to those portions of that state (the District in this case).

In the March 6, 2015 SIP Requirements Rule, EPA detailed the requirements applicable to ozone

⁵ Ozone nonattainment areas are classified based on the severity of their ozone levels (as determined based on the area's "design value," which represents air quality in the area for the most recent three years). The possible classifications for ozone nonattainment areas are Marginal, Moderate, Serious, Severe, and Extreme. *See* CAA section 181(a)(1).

⁶ CAA section 184 details specific requirements for a group of states (and the District of Columbia) that make up the OTR. States in the OTR are required to submit RACT SIP revisions and mandate a certain level of emissions control for the pollutants that form ozone, even if the areas in the state meet the ozone standards. While not the subject of this action, the District did submit their OTR RACT SIP to EPA on August 30, 2018. This SIP revision will be acted on in a separate rulemaking action.

⁷ NNSR requirements continue to apply in the OTR. *See* CAA section 184(b).

nonattainment areas, as well as requirements that apply in the OTR, and provided specific deadlines for SIP submittals. *See* 80 FR 12264.

On February 3, 2017, EPA found that 15 states and the District of Columbia failed to submit SIP revisions in a timely manner to satisfy certain requirements for the 2008 8-hour ozone NAAQS that apply to nonattainment areas and/or states in the OTR. *See* 82 FR 9158. As explained in that rulemaking action, consistent with the CAA and EPA regulations, these Findings of Failure to Submit established certain deadlines for the imposition of sanctions, if a state does not submit a timely SIP revision addressing the requirements for which the finding is being made, and for the EPA to promulgate a Federal implementation plan (FIP) to address any outstanding SIP requirements.

EPA found, *inter alia*, that the District failed to submit SIP revisions in a timely manner to satisfy NNSR requirements for the Washington Area.⁸ The District submitted its May 23, 2018 SIP revision to address the specific NNSR requirements for the 2008 8-hour ozone NAAQS, located in 40 CFR 51.160-165, as well as its obligations under EPA's February 3, 2017 Findings of Failure to Submit. EPA's analysis of how this SIP revision addresses the NNSR requirements for the 2008 8-hour ozone NAAQS and the Findings of Failure to Submit is provided in Section II of this rulemaking action.

II. Summary of SIP Revision and EPA Analysis

This rulemaking action is specific to the District's NNSR requirements. NNSR is a preconstruction review permit program that applies to new major stationary sources or major

⁸ The EPA found that the District also failed to submit SIP revisions for the Control Techniques Guidelines (CTG) for volatile organic compound (VOC) RACT (for all 44 CTGs), Non-CTG VOC RACT for Major Sources, and nitrogen oxide (NO_x) RACT for Major Sources. As noted previously, these SIP requirements will be addressed in separate rulemaking actions and will not be discussed here. *See* 82 FR 9158 (February 3, 2017).

modifications at existing sources located in a nonattainment area.⁹ The specific NNSR requirements for the 2008 8-hour ozone NAAQS are located in 40 CFR 51.160–165. As set forth in the SIP Requirements Rule, for each nonattainment area, a NNSR plan or plan revision was due no later than 36 months after the July 20, 2012 effective date of area designations for the 2008 8-hour ozone standard (i.e., July 20, 2015).^{10,11}

The minimum SIP requirements for NNSR permitting programs for the 2008 8-hour ozone NAAQS are located in 40 CFR 51.165. *See* 40 CFR 51.1114. These NNSR program requirements include those promulgated in the “Phase 2 Rule” implementing the 1997 8-hour ozone NAAQS (75 FR 71018 (November 29, 2005)) and the SIP Requirements Rule implementing the 2008 8-hour ozone NAAQS. Under the Phase 2 Rule, the SIP for each ozone nonattainment area must contain NNSR provisions that: set major source thresholds for oxides of nitrogen (NO_x) and volatile organic compounds (VOC) pursuant to 40 CFR 51.165(a)(1)(iv)(A)(1)(i)-(iv) and (2); classify physical changes as a major source if the change would constitute a major source by itself pursuant to 40 CFR 51.165(a)(1)(iv)(A)(3); consider any significant net emissions increase of NO_x as a significant net emissions increase for ozone pursuant to 40 CFR 51.165(a)(1)(v)(E); consider certain increases of VOC emissions in extreme ozone nonattainment areas as a significant net emissions increase and a major modification for ozone pursuant to 40 CFR 51.165(a)(1)(v)(F); set significant emissions rates for VOC and NO_x

⁹ *See* CAA sections 172(c)(5), 173 and 182.

¹⁰ With respect to states with nonattainment areas subject to a Findings of Failure to Submit NNSR SIP revisions, such revisions would no longer be required if the area were redesignated to attainment. The CAA’s prevention of significant deterioration (PSD) program requirements apply in lieu of NNSR after an area is redesignated to attainment. For areas outside the OTR, NNSR requirements do not apply in areas designated as attainment.

¹¹ While not the subject of this rulemaking action, as the District noted in their May 23, 2018 submittal, the District does not have a SIP-approved PSD program; however, the District is subject to a Federal Implementation Plan (FIP) which incorporates EPA’s PSD permitting requirements from 40 CFR 52.21 into the District’s SIP. *See* 40 CFR 52.499. Therefore, should the District submit, and EPA approve, a redesignation request for attainment of an ozone NAAQS for the Washington Area, the federal regulations would apply, and EPA would issue any necessary PSD air quality permits.

as ozone precursors pursuant to 40 CFR 51.165(a)(1)(x)(A)-(C) and (E); contain provisions for emissions reductions credits pursuant to 40 CFR 51.165(a)(3)(ii)(C)(1)-(2); provide that the requirements applicable to VOC also apply to NO_x pursuant to 40 CFR 51.165(a)(8); and set offset ratios for VOC and NO_x pursuant to 40 CFR 51.165(a)(9)(i)-(iii) (renumbered as (a)(9)(ii)-(iv) under the SIP Requirements Rule for the 2008 8-hour ozone NAAQS). Under the SIP Requirements Rule for the 2008 8-hour ozone NAAQS, the SIP for each ozone nonattainment area designated nonattainment for the 2008 8-hour ozone NAAQS and designated nonattainment for the 1997 ozone NAAQS on April 6, 2015, must also contain NNSR provisions that include the anti-backsliding requirements at 40 CFR 51.1105. *See* 40 CFR 51.165(a)(12).

The District's SIP approved NNSR program, established in Chapters 1 (*Air Quality-General Rules*) and 2 (*Air Quality – General and Nonattainment Area Permits*) in Title 20 of the District of Columbia Municipal Regulations (DCMR), apply to the construction and modification of major stationary sources in nonattainment areas. In its May 23, 2018 SIP revision, the District certifies that the versions of 20 DCMR Chapters 1 and 2 approved in the SIP are at least as stringent as the Federal NNSR requirements for the Washington Area. EPA last approved revisions to the District's major NNSR SIP on March 19, 2015. In that action, EPA approved revisions to the District's SIP which made DOEE's NNSR program consistent with Federal requirements. *See* 80 FR 14310.

EPA notes that Title 20 DCMR section 199 and the District's SIP is more stringent than 40 CFR 51.165(a)(1)(iv)(A)(1), because the definition of "major stationary source" in 20 DCMR section 199 includes a threshold of 25 tons per year or more of NO_x or VOC in any nonattainment area for ozone, which is equivalent to severe ozone nonattainment area classification. As noted

previously, the Washington Area is classified as marginal nonattainment for the 2008 8-hour ozone NAAQS. Therefore, by definition, any major stationary source located in the District is subject to a lower emissions threshold for NO_x and VOC.

Additionally, in its May 23, 2018 SIP revision, the District noted for various NNSR provisions that, “Should the District attain the NAAQS, because the District has not adopted the Prevention of Significant Deterioration (PSD) portions of New Source Review (NSR), the federal regulations would apply. In this case, because the District is in an Ozone Transport Region (OTR), the federal OTR thresholds would apply.” In order for a nonattainment area to become attainment and for OTR emissions thresholds to apply, the District would have to submit, and EPA would have to approve a redesignation request and maintenance plan for the applicable ozone NAAQS.¹² See CAA Section 184(b). The lack of these provisions in the District’s SIP does not impact the requirement to have a fully-approved NNSR program in place, nor does the lack of those requirements impact the approvability of this SIP revision, as the federal requirements would apply or the District could undertake a rulemaking action to update their regulations and subsequently their SIP. For purposes of NNSR, the subject of this rulemaking action, the District’s approved NNSR program is at least as stringent as the federal requirements.¹³

Neither Title 20 of the DCMR nor the District’s approved SIP have the regulatory provisions for an emissions change of VOC in extreme nonattainment areas, specified in 40 CFR 51.165(a)(1)(v)(F) or 40 CFR 51.165(a)(1)(x)(E), because the District’s SIP is not required to

¹² Any source in the OTR is considered major for NO_x and VOC if it emits or has the potential to emit at least 100 tons per year or 50 tons per year, respectively. See 40 CFR 51.165(a)(iv)(A)

¹³ See CAA sections 172(c)(5), 173, 182 and 40 CFR 51.165.

have this requirement for VOC in extreme nonattainment areas until such a time as the District has an extreme nonattainment area. The District has never been designated as extreme for an ozone NAAQS.¹⁴

Neither 20 DCMR section 204 nor the District's approved SIP contain a regulatory provision pertaining to establishing emissions reductions credits (ERC), as specified in 40 CFR 51.165(a)(3)(ii)(C)(2)(i) and 40 CFR 51.165(a)(3)(ii)(C)(2)(ii). However, even if the District's regulations do not offer this emissions reductions credit option, their approved SIP is still adequate to meet the standard ERC requirements found in 40 CFR 51.165(a)(3)(ii)(C)(1), where emissions reductions must be surplus, permanent, quantifiable, and federally enforceable, for example. The District has the appropriate ERC requirements approved in their regulations and their SIP, which enables them to implement the program appropriately and in accordance with federal requirements. *See* 20 DCMR Section 204.

Given the D.C. Cir. Court's recent ruling in *South Coast Air Quality Mgmt. Dist. v. EPA* vacating the anti-backsliding provisions of the SIP Requirements Rule, the District remains required to comply with the anti-backsliding provisions found in 40 CFR 51.165(a)(12). In the District, neither 20 DCMR Chapters 1 and 2 or the District SIP contain anti-backsliding provisions found in 40 CFR 51.165(a)(12), which applied to NNSR requirements for the 1997 ozone NAAQS. However, EPA finds that 20 DCMR and the District's SIP presently include appropriate thresholds for major stationary sources and emissions offset ratios for the worst air quality designations these nonattainment areas have been designated. For example, in 20 DCMR section

¹⁴ As the District noted in their May 23, 2018 revision, the District is aware that should they be bumped up to extreme nonattainment or want to be redesignated to attainment for the 2008 8-hour ozone NAAQS, federal requirements would apply, or they could update their regulations and SIP to meet the necessary applicable requirements.

199, a source is considered a “major stationary source” if it emits 25 tons per year of NO_x or VOC in any nonattainment area for ozone, except for the 10 ton per year or more of NO_x and VOC in an extreme nonattainment area for ozone.¹⁵ This emissions threshold is equivalent to an area that was designated as severe nonattainment for the ozone NAAQS and is therefore more stringent. Additionally, emissions offset ratios for sources located in the District are more stringent than the requirements of 40 CFR 51.165(a)(9)(i). 20 DCMR section 204.18 and the approved District SIP require sources in ozone nonattainment areas to offset their NO_x and VOC emissions at a ratio of 1.3 to 1 versus the Federal NNSR requirement for a source located in a marginal nonattainment area to offset NO_x and VOC at a less stringent ratio of 1.1 to 1. *See* 40 CFR 51.165(a)(9)(i)(A). Therefore, EPA finds that the District’s regulations and approved SIP are more stringent than EPA’s NNSR anti-backsliding requirements and their program is adequate to implement NNSR for the 2008 ozone NAAQS.

The versions of 20 DCMR Chapters 1 and 2 that are contained in the current SIP have not changed, with respect to NNSR since the 2015 rulemaking where EPA last approved the District’s NNSR provisions. These versions of the rules cover the Washington Area and remain adequate to meet all applicable NNSR requirements for the 2008 8-hour ozone NAAQS found in 40 CFR 51.165, the Phase 2 Rule and the SIP Requirements Rule.

III. Proposed Action

EPA is proposing to approve the District’s May 23, 2018 SIP revision addressing the NNSR requirements for the 2008 ozone NAAQS for the Washington Area. EPA has concluded that the District’s submission fulfills the 40 CFR 51.1114 revision requirement, meets the requirements

¹⁵ As noted in this rulemaking and in the District’s May 23, 2018 SIP revision, the Washington Area has never been classified as Extreme Nonattainment for any ozone NAAQS.

of CAA sections 110 and 172 and the minimum SIP requirements of 40 CFR 51.165, as well as its obligations under EPA's February 3, 2017 Findings of Failure to Submit. *See* 82 FR 9158. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

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 proposed 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).

In addition, this proposed rule, approving the District's 2008 8-hour ozone NAAQS Certification SIP revision for NNSR 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.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental

relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: March 7, 2019.

Cosmo Servidio,
Regional Administrator,
Region III.

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