



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2015-0850; FRL-9998-05-Region 6]

Air Plan Approval; New Mexico; Approval of Revised Statutes; Error Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is approving revisions to New Mexico's State Implementation Plan (SIP) that incorporate updates to the New Mexico statutes. EPA is also correcting its previous approval of some statute provisions as approval of these provisions into the SIP was in error.

DATES: This final rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. **EPA-R06-OAR-2015-0850**. All documents in the docket are listed on the

<https://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., 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 <https://www.regulations.gov> or in hard copy at the EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270.

FOR FURTHER INFORMATION CONTACT: Jeff Riley, EPA Region 6 Office, Infrastructure and Ozone Section, 1201 Elm Street, Suite 500, Dallas, TX 75270, 214-665-8542,

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SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” and “our” means the EPA.

I. Background

The background for this action is discussed in detail in our February 27, 2019 direct final rule and proposal (84 FR 6334, 84 FR 6353). In the direct final rule, we approved revisions to the New Mexico SIP that pertain to updated statutes under New Mexico Statutes Annotated 1978 (NMSA) Chapter 74 - Article 2 contained in the State’s August 6, 2015 submittal. We also made an error correction to remove from the New Mexico SIP certain statutes under NMSA 1978 Chapter 74, Article 2 originally approved in our November 2, 1984 rulemaking (49 FR 44099).

The rule and proposal stated that if any relevant adverse comments were received by the end of the public comment period on March 29, 2019, the direct final rule would be withdrawn, and we would respond to the comments in a subsequent final action. Relevant adverse comments were received during the comment period, and the direct final rule was partially withdrawn on May 16, 2019 (84 FR 22049). This partial withdrawal only concerned statutes being removed from the SIP (NMSA sections 74-2-6, 74-2-12 and 74-2-13) through our direct final rule that were the subject of relevant adverse comments. Our February 27, 2019 proposal provides the basis for this final action.

We received comments on our proposal from two commenters, the City of Albuquerque Environmental Health Department (EHD) and the New Mexico Environmental Department (NMED). Our responses to the comments are below.

II. Response to Comments

Comment 1: EHD states that NMSA section 74-2-4 (*Local authority*) must be SIP-approved in full to satisfy CAA section 110(a)(2) requirements because it authorizes creation of a local authority to assume control over air quality in a local jurisdiction (Albuquerque-Bernalillo County), using a local board, local agency, and an agency director to perform duties which would otherwise be performed by the NMED Secretary in the remainder of the state. This section specifically grants EHD authority to fulfill CAA responsibilities for Bernalillo County.

Response 1: EPA did not address NMSA section 74-2-4 in our February 27, 2019 direct final rulemaking. Thus, this comment is outside the scope of this rulemaking. However, EPA is addressing this comment in a separate direct final rulemaking with the opportunity for public comment published elsewhere in this issue of the Federal Register.

Comment 2: EHD and NMED state that NMSA section 74-2-5.1 (*Duties and powers of the department and the local agency*) must be SIP-approved to satisfy CAA section 110(a)(2) requirements because it describes the powers of EHD and NMED to manage air quality and to implement and enforce air quality requirements, such as the powers to:

- Conduct investigations & studies, entering properties;
- Institute legal proceedings to compel compliance;
- Encourage voluntary cooperation;
- Consult on efficacy of contaminant sources, devices or controls;
- Establish small business assistance program (CAA section 507);
- Accept & administer grants (CAA section 105); and
- Classify & record air contaminant sources (emission inventories).

Further, NMSA section 74-2-5.1 authorizes EHD to develop and propose control strategies to its Air Board.

Response 2: EPA did not address NMSA section 74-2-5.1 in our February 27, 2019 direct final rulemaking. This comment is outside the scope of this rulemaking. However, EPA is addressing this comment in a separate direct final rulemaking with the opportunity for public comment published elsewhere in this issue of the Federal Register.

Comment 3: EHD and NMED commented that NMSA section 74-2-6 (*Adoption of regulations; notice and hearings*) should not be removed from the SIP because it establishes the required legal procedures for adopting regulations. Both state that if this section is not included in the SIP, the NMED Environmental Improvement Board and the City of Albuquerque Air Board do not have the required procedural elements under the CAA for adopting regulations for a SIP.

Response 3: EPA's February 27, 2019 action proposed to remove NMSA section 74-2-6 from the SIP because the language was viewed as administrative in nature, and therefore need not be made federally enforceable by incorporating this section into the SIP. The comments submitted by EHD and NMED have provided clarification that this language outlines an established process that must occur prior to adoption and submission of regulations to revise the SIP. We agree with the commenters that NMSA section 74-2-6 details necessary procedural elements for adopting regulations that are not provided elsewhere in SIP-approved regulations and statutes. EPA is approving the August 6, 2015 updates to NMSA section 74-2-6 into the SIP to address this comment.

Comment 4: EHD and NMED argue that NMSA section 74-2-12 (*Enforcement*) should not be removed from the SIP because it confers general authority to EHD and NMED to manage an effective air quality enforcement program. Further, both argue that NMSA section 74-2-4(D) does not convey general enforcement authority to either agency.

Response 4: EPA's February 27, 2019 action proposed to remove NMSA section 74-2-12 from the SIP because we viewed the language as being duplicative of SIP-approved NMSA section 74-2-4(D), which we read to provide for administration and enforcement of the Air Quality Control Act. The comments submitted by EHD and NMED have provided clarification that this language does not confer general enforcement authority to either agency; rather, NMSA section 74-2-4(D) only authorizes NMED to assert jurisdiction in Bernalillo County if the Air Board, EHD or the EHD Director fail to adequately protect air quality. Therefore, we agree with the commenters that NMSA section 74-2-12 is essential for demonstrating adequate state legal authority for enforcement actions, as required by CAA section 110(a)(2)(C). However, we note that this authority is conferred to each agency by NMSA section 74-2-12(A)(1) & (2), with the remaining paragraphs providing details specific to each agency's implementation of the authority granted. The remaining paragraphs contain elements appropriate for state and local agencies to adopt and implement, but inclusion of these agency-specific details into the federally-enforceable SIP is not a requirement under CAA section 110(a)(2)(C) and may result in confusion regarding applicable provisions for federal enforcement actions.

EPA concludes that this authority is not provided elsewhere in SIP-approved regulations and statutes, and we are approving the August 6, 2015 updates to NMSA section 74-2-12(A)(1) & (2) into the SIP to address this comment and remove the remainder of NMSA section 74-2-12 from the SIP.

Comment 5: EHD and NMED assert that NMSA section 74-2-13 (*Inspection*) should not be removed from the SIP because it authorizes "right of entry" on any premises on which an emission source is located or where required records are stored. It also authorizes the copying of records, sampling of emissions, and the inspection of monitoring equipment and methods.

Further, both state that this section provides more specific authority for investigations than the general authority granted under NMSA section 74-2-5.1.

Response 5: EPA's February 27, 2019 action proposed to remove NMSA section 74-2-13 from the SIP because we viewed the language as being duplicative of NMSA section 74-2-5.1, which we read to confer similar authority to EHD and NMED to enter any premises the agency has reasonable cause to believe is or will become a source contributing to air pollution, as well as authority to require the production of information relating to emissions that cause or contribute to air pollution. We note that NMSA section 74-2-5.1 was erroneously cited as being SIP-approved in our February 27, 2019 action. The comments submitted by EHD and NMED have provided clarification that NMSA section 74-2-5.1 does grant the authority to make investigations in order to determine whether a source should be regulated under the AQCA and to conduct enforcement proceedings to compel compliance, but NMSA section 74-2-13 specifically grants these agencies the right to entry to the premises on which a *regulated* emission source is located for the purposes of reviewing records, inspection of monitoring equipment, or to conduct sampling. Further, NMSA section 74-2-13 grants these agencies authority to obtain a search warrant to conduct an inspection which has been refused. Therefore, we agree with the commenters that NMSA section 74-2-13 is essential for demonstrating adequate state legal authority to conduct inspections, as required by CAA section 110(a)(2)(C). EPA concludes that this extent of authority is not provided elsewhere in SIP-approved regulations and statutes, and we are approving the August 6, 2015 updates to NMSA section 74-2-13 into the SIP to address this comment.

We note that our February 27, 2019 action removed NMSA sections 74-2-14, 74-2-15, 74-2-15.1, and 74-2-16 from the New Mexico SIP; however, this removal was not finalized due to

inclusion of these sections in a portion of that rulemaking's amendatory language that also included NMSA sections 74-2-12 and 74-2-13, which were impacted by the relevant adverse comments received. EPA's May 16, 2019 partial withdrawal required our withdrawal of the entire portion of amendatory language. Our February 27, 2019 removal of NMSA sections 74-2-14, 74-2-15, 74-2-15.1, and 74-2-16 from the New Mexico SIP did not receive relevant adverse comments; therefore, EPA is finalizing removal of these sections through this final rulemaking.

III. Final Action

We are approving revisions to the New Mexico SIP that pertain to updated statutes under NMSA 1978 Chapter 74, Article 2 sections 74-2-6, 74-2-12, and 74-2-13 contained in the State's August 6, 2015 submittal. We are also making an error correction to remove from the New Mexico SIP certain statutes under NMSA 1978 Chapter 74, Article 2 sections 74-2-14, 74-2-15, 74-2-15.1, and 74-2-16 originally approved in our November 2, 1984 rulemaking.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. 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);

- 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, 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, 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 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).

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 Clean Air Act, 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 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, Sulfur oxides, Volatile organic compounds.

Dated: August 13, 2019.

Kenley McQueen,
Regional Administrator, Region 6.

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 GG – New Mexico

2. In §52.1620(e), the table titled “EPA-Approved New Mexico Statutes” is amended under “Chapter 74-Environmental Improvement” by:

- a. Revising the entries for Sections 74-2-6, 74-2-12, and 74-2-13; and
- b. Removing the entries for Sections 74-2-14, 74-2-15, 74-2-15.1, and 74-2-16.

The revisions read as follows:

§52.1620 Identification of plan.

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(e) * * *

EPA-APPROVED NEW MEXICO STATUTES

State citation	Title/subject	State approval/ effective date	EPA approval date	Comments
New Mexico Statutes				
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Chapter 74—Environmental Improvement				
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74-2-6	Adoption of regulations; notice and hearings	8/6/2015	[Insert date of publication in the Federal Register], [Insert Federal Register citation]	
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74-2-12	Enforcement; compliance orders	8/6/2015	[Insert date of publication in the Federal Register], [Insert Federal Register citation]	Only paragraphs (A)(1) & (2) are SIP- approved (enforcement authority under CAA section 110(a)(2)(C)).
74-2-13	Inspection	8/6/2015	[Insert date of publication in the Federal Register], [Insert Federal Register citation]	
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