



6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R04-OAR-2019-0155; FRL - 10004-69-Region 4]

#### Air Plan Approval; Kentucky: Cross-State Air Pollution Rule

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving changes to the Kentucky State Implementation Plan (SIP) concerning the Cross-State Air Pollution Rule (CSAPR) submitted by Kentucky on September 14, 2018, as later clarified on December 18, 2018. Under CSAPR, large electricity generating units (EGUs) in Kentucky are subject to Federal Implementation Plans (FIPs) requiring the units to participate in CSAPR's federal trading program for annual emissions of nitrogen oxides (NO<sub>x</sub>), one of CSAPR's two federal trading programs for ozone season emissions of NO<sub>x</sub>, and one of CSAPR's two federal trading programs for annual emissions of sulfur dioxide (SO<sub>2</sub>). This action approves into the SIP the Commonwealth's regulations requiring large Kentucky EGUs to participate in CSAPR state trading programs for annual NO<sub>x</sub> emissions and annual SO<sub>2</sub> emissions integrated with the CSAPR federal trading programs, replacing the corresponding FIP requirements. EPA is approving the portions of the SIP revision concerning these CSAPR state trading programs because the SIP revision meets the requirements of the Clean Air Act (CAA or Act) and EPA's regulations for approval of a CSAPR full SIP revision replacing the requirements of a CSAPR FIP. Under the CSAPR regulations, approval of these portions of the SIP revision automatically eliminates Kentucky units' obligations to participate in CSAPR's federal trading programs for

annual NO<sub>x</sub> emissions and annual SO<sub>2</sub> emissions under the corresponding CSAPR FIPs addressing interstate transport requirements for the 1997 annual fine particulate matter (PM<sub>2.5</sub>) national ambient air quality standard (NAAQS) and the 2006 24-hour PM<sub>2.5</sub> NAAQS. Approval of these portions of the SIP revision would also satisfy Kentucky's good neighbor obligation under the CAA to prohibit emissions which will significantly contribute to nonattainment or interfere with maintenance of the 1997 annual PM<sub>2.5</sub> NAAQS and 2006 24-hour PM<sub>2.5</sub> NAAQS.

**DATES:** This rule is effective **[Insert 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-2019-0155. All documents in the docket are listed on the [www.regulations.gov](http://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](http://www.regulations.gov) or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation 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:** D. Brad Akers, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S.

Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Mr. Akers can be reached by telephone at (404) 562-9089 or via electronic mail at akers.brad@epa.gov.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background on CSAPR and CSAPR-related SIP revisions**

EPA issued CSAPR in July 2011 to address the requirements of CAA section 110(a)(2)(D)(i)(I) concerning interstate transport of air pollution. As amended (including the 2016 CSAPR Update),<sup>1</sup> CSAPR requires 27 Eastern states to limit their statewide emissions of SO<sub>2</sub> and/or NO<sub>x</sub> in order to mitigate transported air pollution unlawfully impacting other states' ability to attain or maintain four NAAQS: the 1997 annual PM<sub>2.5</sub> NAAQS, the 2006 24-hour PM<sub>2.5</sub> NAAQS, the 1997 8-hour ozone NAAQS, and the 2008 8-hour ozone NAAQS. The CSAPR emissions limitations are defined in terms of maximum statewide "budgets" for emissions of annual SO<sub>2</sub>, annual NO<sub>x</sub>, and/or ozone season NO<sub>x</sub> by each covered state's large EGUs. The CSAPR state budgets are implemented in two phases of generally increasing stringency, with the Phase 1 budgets applying to emissions in 2015 and 2016 and the Phase 2 (and CSAPR Update) budgets applying to emissions in 2017 and later years. As a mechanism for achieving compliance with the emissions limitations, CSAPR establishes five federal emissions trading programs: a program for annual NO<sub>x</sub> emissions, two geographically separate

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<sup>1</sup> See 81 FR 74504 (October 26, 2016). The CSAPR Update was promulgated to address interstate pollution with respect to the 2008 ozone NAAQS and to address a judicial remand of certain original CSAPR ozone season NO<sub>x</sub> budgets promulgated with respect to the 1997 ozone NAAQS. See 81 FR at 74505. The CSAPR Update established new emission reduction requirements addressing the more recent NAAQS and coordinated them with the remaining emission reduction requirements addressing the older NAAQS, so that starting in 2017, CSAPR includes two geographically separate trading programs for ozone season NO<sub>x</sub> emissions covering EGUs in a total of 23 states. See 40 CFR 52.38(b)(1)-(2). EPA acknowledges that the D.C. Circuit issued decisions in *Wisconsin v. EPA*, 938 F.3d 303 (Sept. 13, 2019) and *New York v. EPA*, 781 Fed. Appx. 4 (Oct. 1, 2019) regarding the CSAPR Update; however, those decisions did not address the annual programs designed to fulfill the requirements of the 1997 and 2006 PM<sub>2.5</sub> NAAQS.

programs for annual SO<sub>2</sub> emissions, and two geographically separate programs for ozone-season NO<sub>x</sub> emissions. CSAPR also establishes FIP requirements applicable to the large EGUs in each covered state. Currently, the CSAPR FIP provisions require each state's units to participate in up to three of the five CSAPR trading programs.

CSAPR includes provisions under which states may submit and EPA will approve SIP revisions to modify or replace the CSAPR FIP requirements while allowing states to continue to meet their transport-related obligations using either CSAPR's federal emissions trading programs or state emissions trading programs integrated with the federal programs.<sup>2</sup> Through such a SIP revision, a state may replace EPA's default provisions for allocating emission allowances among the state's units, employing any state-selected methodology to allocate or auction the allowances, subject to timing conditions and limits on overall allowance quantities. In the case of CSAPR's federal trading programs for ozone season NO<sub>x</sub> emissions (or an integrated state trading program), a state may also expand trading program applicability to include certain smaller electricity generating units.<sup>3</sup> If a state wants to replace CSAPR FIP requirements with SIP requirements under which the state's units participate in a state trading program that is integrated with and identical to the federal trading program even as to the allocation and applicability provisions, the state may submit a SIP revision for that purpose as well. However, no emissions budget increases or other substantive changes to the trading program provisions are allowed. A state whose units are subject to multiple CSAPR FIPs and federal trading programs may submit SIP revisions to modify or replace either some or all of those FIP requirements.

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<sup>2</sup> See 40 CFR 52.38, 52.39. States also retain the ability to submit SIP revisions to meet their transport-related obligations using mechanisms other than the CSAPR federal trading programs or integrated state trading programs.

<sup>3</sup> States covered by both the CSAPR Update and the NO<sub>x</sub> SIP Call have the additional option to expand applicability under the CSAPR NO<sub>x</sub> Ozone Season Group 2 Trading Program to include non-electric generating units that would have participated in the former NO<sub>x</sub> Budget Trading Program.

States can submit two basic forms of CSAPR-related SIP revisions effective for emissions control periods in 2017 or later years (or 2019 or later years in the case of the CSAPR NOx Ozone Season Group 2 Trading Program).<sup>4</sup> Under the first alternative – an “abbreviated” SIP revision – a state may submit a SIP revision that upon approval replaces the default allowance allocation and/or applicability provisions of a CSAPR federal trading program for the state.<sup>5</sup> Approval of an abbreviated SIP revision leaves the corresponding CSAPR FIP and all other provisions of the relevant federal trading program in place for the state’s units.

Under the second alternative – a “full” SIP revision – a state may submit a SIP revision that upon approval replaces a CSAPR federal trading program for the state with a state trading program integrated with the federal trading program, so long as the state trading program is substantively identical to the federal trading program or does not substantively differ from the federal trading program except as discussed above with regard to the allowance allocation and/or applicability provisions.<sup>6</sup> For purposes of a full SIP revision, a state may either adopt state rules with complete trading program language, incorporate the federal trading program language into its state rules by reference (with appropriate conforming changes), or employ a combination of these approaches.

The CSAPR regulations identify several important consequences and limitations associated with approval of a full SIP revision. First, upon EPA’s approval of a full SIP revision as correcting the deficiency in the state’s implementation plan that was the basis for a particular set of CSAPR FIP requirements, the obligation to participate in the corresponding CSAPR

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<sup>4</sup> CSAPR also provides for a third, more streamlined form of SIP revision that is effective only for control periods in 2016 (or 2018 in the case of the CSAPR NOx Ozone Season Group 2 Trading Program) and is not relevant here. *See* 40 CFR 52.38(a)(3), (b)(3), (b)(7); 52.39(d), (g).

<sup>5</sup> *See* 40 CFR 52.38(a)(4), (b)(4), (b)(8); 52.39(e), (h).

<sup>6</sup> *See* 40 CFR 52.38(a)(5), (b)(5), (b)(9); 52.39(f), (i).

federal trading program is automatically eliminated for units subject to the state's jurisdiction without the need for a separate EPA withdrawal action, so long as EPA's approval of the SIP is full and unconditional.<sup>7</sup> Second, approval of a full SIP revision does not terminate the obligation to participate in the corresponding CSAPR federal trading program for any units located in any Indian country within the borders of the state, and if and when a unit is located in Indian country within a state's borders, EPA may modify the SIP approval to exclude from the SIP, and include in the surviving CSAPR FIP instead, certain trading program provisions that apply jointly to units in the state and to units in Indian country within the state's borders.<sup>8</sup>

Finally, if at the time a full SIP revision is approved EPA has already started recording allocations of allowances for a given control period to a state's units, the federal trading program provisions authorizing EPA to complete the process of allocating and recording allowances for that control period to those units will continue to apply, unless EPA's approval of the SIP revision provides otherwise.<sup>9</sup>

In the 2011 CSAPR rulemaking, among other findings, EPA determined that air pollution transported from Kentucky would unlawfully affect other states' ability to attain and maintain the 1997 annual PM<sub>2.5</sub> NAAQS and the 2006 24-hour PM<sub>2.5</sub> NAAQS, established annual NO<sub>x</sub> and SO<sub>2</sub> budgets for Kentucky's EGUs representing full remedies for the Commonwealth's interstate transport obligations with respect to these NAAQS, and implemented the budgets by including the EGUs in annual NO<sub>x</sub> and SO<sub>2</sub> trading programs.<sup>10</sup> Consequently, Kentucky's units meeting the CSAPR applicability criteria are currently subject to CSAPR FIPs that require participation in the CSAPR NO<sub>x</sub> Annual Trading Program and the CSAPR SO<sub>2</sub> Group 1 Trading

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<sup>7</sup> See 40 CFR 52.38(a)(6), (b)(10)(i); 52.39(j).

<sup>8</sup> See 40 CFR 52.38(a)(5)(iv)-(v), (a)(6), (b)(5)(v)-(vi), (b)(9)(vi)-(vii), (b)(10)(i); 52.39(f)(4)-(5), (i)(4)-(5), (j).

<sup>9</sup> See 40 CFR 52.38(a)(7), (b)(11)(i); 52.39(k).

<sup>10</sup> See 76 FR at 48209-13.

Program in order to address, in full, the Commonwealth's interstate transport obligations with respect to both the 1997 annual PM<sub>2.5</sub> NAAQS and the 2006 24-hour PM<sub>2.5</sub> NAAQS.<sup>11</sup>

In a notice of proposed rulemaking (NPRM) published on July 30, 2019 (84 FR 36852), EPA proposed to approve Kentucky's September 14, 2018, SIP submittal designed to replace the CSAPR federal annual SO<sub>2</sub> and NO<sub>x</sub> trading programs and ozone season NO<sub>x</sub> trading program. Comments on the NPRM were due on or before August 29, 2019. EPA received adverse comments on the proposed action to approve the portions of Kentucky's submittal designed to replace the CSAPR federal ozone season NO<sub>x</sub> trading program. However, EPA received no adverse comments on the proposed action to approve the portions of Kentucky's submittal designed to replace the CSAPR federal annual SO<sub>2</sub> and NO<sub>x</sub> trading programs.

In this action, EPA is finalizing approval of the portions of Kentucky's SIP which replace the CSAPR federal annual SO<sub>2</sub> and NO<sub>x</sub> trading programs only. EPA will address the remaining portions of the September 14, 2018, SIP submittal in a separate action. Please refer to the NPRM for more detailed information regarding the SIP revision and the Agency's rationale for today's final rulemaking.

## **II. Incorporation by Reference**

In this document, 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 the Kentucky Regulations 401 KAR 51:240, entitled "Cross-State Air Pollution Rule (CSAPR) NO<sub>x</sub> annual trading program" and 401 KAR 51.260, entitled "Cross-State Air Pollution Rule (CSAPR) SO<sub>2</sub> group 1 trading program." EPA is approving the portions of the SIP revision concerning these CSAPR state trading programs because the SIP revision meets the

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<sup>11</sup> See 40 CFR 52.38(a)(2)(i); 52.39(b); 52.940(a)(1); 52.941(a).

requirements of the Act and EPA's regulations for approval of a CSAPR full SIP revision replacing the requirements of a CSAPR FIP. The rules became state-effective as of July 5, 2018. EPA has made, and will continue to make, these materials generally available through [www.regulations.gov](http://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 State implementation plan, 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 by reference in the next update to the SIP compilation.<sup>12</sup>

### **III. Final Action**

EPA is approving portions of Kentucky's September 14, 2018, SIP submittal, as clarified by the December 18, 2018, letter, concerning the establishment of CSAPR state trading programs for Kentucky units for annual NO<sub>x</sub> and SO<sub>2</sub> emissions. These portions of this SIP revision adopt into the SIP state trading program rules codified in Kentucky regulations at 401 KAR 51:240, "Cross-State Air Pollution Rule (CSAPR) NO<sub>x</sub> annual trading program" and 401 KAR 51.260, "Cross-State Air Pollution Rule (CSAPR) SO<sub>2</sub> group 1 trading program." These Kentucky CSAPR state trading programs will be integrated with the federal CSAPR NO<sub>x</sub> Annual Trading Program and the federal CSAPR SO<sub>2</sub> Group 1 Trading Program, respectively, and are substantively identical to the federal trading programs. Kentucky units therefore will generally be required to meet requirements under Kentucky's CSAPR state trading programs equivalent to the requirements the units otherwise would have been required to meet under the corresponding CSAPR federal trading programs. Under the Commonwealth's regulations, Kentucky will retain

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<sup>12</sup> See 62 FR 27968 (May 22, 1997).

EPA's default allowance allocation methodology and EPA will remain the implementing authority for administration of the trading programs. EPA is approving the SIP revision because it meets the requirements of the CAA and EPA's regulations for approval of a CSAPR full SIP revision replacing a federal trading program with a state trading program that is integrated with and substantively identical to the federal trading program.

EPA promulgated the FIP provisions requiring Kentucky units to participate in the federal CSAPR NO<sub>x</sub> Annual Trading Program and the federal CSAPR SO<sub>2</sub> Group 1 Trading Program in order to address Kentucky's obligations under CAA section 110(a)(2)(D)(i)(I) with respect to the 1997 Annual PM<sub>2.5</sub> NAAQS and the 2006 24-hour PM<sub>2.5</sub> NAAQS in the absence of SIP provisions addressing those requirements. Approving the Kentucky SIP submittal adopting CSAPR state trading program rules for annual NO<sub>x</sub> and SO<sub>2</sub> substantively identical to the corresponding CSAPR federal trading program regulations (or differing only with respect to the allowance allocation methodology) corrects the same deficiencies in the SIP that otherwise would be corrected by those CSAPR FIPs. Under the CSAPR regulations, upon EPA's full and unconditional approval of a SIP revision as correcting the SIP's deficiency that is the basis for a particular CSAPR FIP, the obligation to participate in the corresponding CSAPR federal trading program is automatically eliminated for units subject to the state's jurisdiction (but not for any units located in any Indian country within the state's borders).<sup>13</sup> EPA's approval of portions of Kentucky's SIP submittal establishing CSAPR state trading program rules for annual NO<sub>x</sub> emissions and annual SO<sub>2</sub> emissions therefore results in automatic termination of the obligations of Kentucky units to participate in the federal CSAPR NO<sub>x</sub> Annual Trading Program and the federal CSAPR SO<sub>2</sub> Group 1 Trading Program.

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<sup>13</sup> See 40 CFR 52.38(a)(6); 52.39(j).

#### **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 Act and applicable Federal regulations. *See* 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. These actions merely approve state law as meeting Federal requirements and do not impose additional requirements beyond those imposed by state law. For that reason, these actions:

- Are not significant regulatory actions 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);
- Are not Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory actions because SIP approvals are exempted under Executive Order 12866;
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are 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.*);
- Do 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);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are 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
- Do 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 these actions 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 these actions 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 these actions 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. These actions 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, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: January 15, 2020.

Mary S. Walker,  
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 A—General Provisions**

2. Amend § 52.38 by revising paragraph (a)(8)(iii) to read as follows:

**§52.38 What are the requirements of the Federal Implementation Plans (FIPs) for the Cross-State Air Pollution Rule (CSAPR) relating to emissions of nitrogen oxides?**

(a) \* \* \*

(8) \* \* \*

(iii) For each of the following States, the Administrator has approved a SIP revision under paragraph (a)(5) of this section as correcting the SIP's deficiency that is the basis for the CSAPR Federal Implementation Plan set forth in paragraphs (a)(1), (a)(2)(i), and (a)(3) and (4) of this section with regard to sources in the State (but not sources in any Indian country within the borders of the State): Alabama, Georgia, Indiana, Kentucky, Missouri, and South Carolina.

\* \* \* \* \*

3. Amend § 52.39 by revising paragraph (l)(3) to read as follows:

**§52.39 What are the requirements of the Federal Implementation Plans (FIPs) for the Cross-State Air Pollution Rule (CSAPR) relating to emissions of sulfur dioxide?**

\* \* \* \* \*

(l) \* \* \*

(3) For each of the following States, the Administrator has approved a SIP revision under paragraph (f) of this section as correcting the SIP's deficiency that is the basis for the CSAPR Federal Implementation Plan set forth in paragraphs (a), (b), (d), and (e) of this section with regard to sources in the State (but not sources in any Indian country within the borders of the State): Indiana, Kentucky, and Missouri.

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**Subpart S - Kentucky**

4. Amend § 52.920, in paragraph (c), in Table 1 under the heading “Chapter 51 Attainment and Maintenance of the National Ambient Air Quality Standards” by adding in numerical order entries for “401 KAR 51:240” and “401 KAR 51:260” to read as follows:

**§52.920 Identification of plan.**

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(c) \* \* \*

**TABLE 1—EPA-APPROVED KENTUCKY REGULATIONS**

<b>State citation</b>	<b>Title/subject</b>	<b>State effective date</b>	<b>EPA approval date</b>	<b>Explanation</b>
*****				
<b>Chapter 51 Attainment and Maintenance of the National Ambient Air Quality Standards</b>				
**	**	*	*	*
401 KAR 51:240	Cross-State Air Pollution Rule (CSAPR) NO <sub>x</sub> annual trading program	7/5/2018	[Insert date of publication in <b>Federal Register</b> ] [Insert <b>Federal Register</b> citation]	
401 KAR 51:260	Cross-State Air Pollution Rule (CSAPR) SO <sub>2</sub> group 1 trading program	7/5/2018	[Insert date of publication in <b>Federal Register</b> ] [Insert <b>Federal Register</b> citation]	
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[FR Doc. 2020-01747 Filed: 2/7/2020 8:45 am; Publication Date: 2/10/2020]