6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2019-0694; FRL-10005-12-Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Emissions Statement Certification for the 2015 Ozone National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a state implementation plan (SIP) revision formally submitted by the Commonwealth of Virginia (Virginia). Under the Clean Air Act (CAA), a state's SIP must require stationary sources in ozone nonattainment areas classified as marginal or above to report annual emissions of nitrogen oxides (NO_x) and volatile organic compounds (VOC). The SIP revision provides Virginia's certification that its existing emissions statement program satisfies the emissions statement requirements of the CAA for the 2015 ozone National Ambient Air Quality Standard (NAAQS). EPA is proposing to approve Virginia's emissions statement program certification for the 2015 ozone NAAQS as a SIP revision in accordance with the requirements of the 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-2019-0694 at https://www.regulations.gov, or via email to spielberger.susan@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 https://www.epa.gov/dockets/commenting-epa-dockets.

FOR FURTHER INFORMATION CONTACT: Erin Malone, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2190. Ms. Malone can also be reached via electronic mail at malone.erin@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Under the CAA, EPA establishes NAAQS for criteria pollutants in order to protect human health and the environment. In response to scientific evidence linking ozone exposure to adverse health effects, EPA promulgated the first ozone NAAQS, the 0.12 part per million (ppm) 1-hour ozone

NAAQS, in 1979. See 44 FR 8202 (February 8, 1979). The CAA requires EPA to review and reevaluate the NAAQS every five years in order to consider updated information regarding the effects of the criteria pollutants on human health and the environment. On July 18, 1997, EPA promulgated a revised ozone NAAQS, referred to as the 1997 ozone NAAQS, of 0.08 ppm averaged over eight hours. 62 FR 38855. This 8-hour ozone NAAQS was determined to be more protective of public health than the previous 1979 1-hour ozone NAAQS. In 2008, EPA strengthened the 8-hour ozone NAAQS from 0.08 to 0.075 ppm. See 73 FR 16436 (March 27, 2008). In 2015, EPA further refined the 8-hour ozone NAAQS from 0.075 ppm to 0.070 ppm. The 0.070 ppm standard is referred to as the 2015 ozone NAAQS. See 80 FR 65452 (October 26, 2015).

On June 4, 2018 and July 25, 2018, EPA designated nonattainment areas for the 2015 ozone NAAQS. 83 FR 25776 and 83 FR 35136. Effective August 3, 2018, the Washington, DC-MD-VA area was designated as marginal nonattainment for the 2015 ozone NAAQS. The Virginia portion of the Washington, DC-MD-VA nonattainment area comprises Arlington County, Fairfax County, Loudoun County, Prince William County, Alexandria City, Fairfax City, Falls Church City, Manassas City, and Manassas Park City, Virginia. See 40 CFR 81.347.

Section 182 of the CAA identifies plan submissions and requirements for ozone nonattainment areas. Specifically, section 182(a)(3)(B) requires that states develop and submit, as a revision to their SIP, rules which establish annual reporting requirements for certain stationary sources. Sources that are within ozone nonattainment areas must annually report the actual emissions of NO_x and VOC to the state. However, states may waive this requirement for sources that emit under 25 tons per year (tpy) of NO_x and VOC if the state provides an inventory of emissions

from such class or category of sources as required by CAA sections 172 and 182. See CAA section 182(a)(3)(B)(ii).

EPA published guidance on source emissions statements in a July 1992 memorandum titled, "Guidance on the Implementation of an Emission Statement Program" and in a March 14, 2006 memorandum titled, "Emission Statement Requirements Under 8-hour Ozone NAAQS Implementation" (2006 memorandum). In addition, on December 6, 2018, EPA issued a final rule addressing a range of nonattainment area SIP requirements for the 2015 ozone NAAQS, including the emission statement requirements of CAA section 182(a)(3)(B) (2018 final rule). 83 FR 62998, codified at 40 CFR Part 51, subpart CC. The 2006 memorandum clarified that the source emissions statement requirement of CAA section 182(a)(3)(B) was applicable to all areas designated nonattainment for the 1997 ozone NAAQS and classified as marginal or above under subpart 2, part D, title I of the CAA. Per EPA's 2018 final rule, the source emissions statement requirement also applies to all areas designated nonattainment for the 2015 ozone NAAQS. 83 FR 62998, 63023.

According to the preamble to EPA's 2018 final rule, most areas that are required to have an emissions statement program for the 2015 ozone NAAQS already have one in place due to a nonattainment designation for an earlier ozone NAAQS. 83 FR 62998, 63001. EPA's 2018 final rule states that, "Many air agencies already have regulations in place to address certain nonattainment area planning requirements due to nonattainment designations for a prior ozone NAAQS. Air agencies should review any existing regulation that was previously approved by the EPA to determine whether it is sufficient to fulfill obligations triggered by the revised ozone NAAQS." Id. In cases where an existing emissions statement rule is still adequate to meet the

emissions statement requirement under the 2015 ozone NAAQS, states may provide the rationale for that determination to EPA in a written statement for approval in the SIP to meet the requirements of CAA section 182(a)(3)(B). 83 FR 62998, 63002. In this statement, states should identify how the emissions statement requirements of CAA section 182(a)(3)(B) are met by their existing emissions statement rule. Id.

In summary, the Commonwealth of Virginia is required to submit, as a formal revision to its SIP, a statement certifying that Virginia's existing emissions statement program satisfies the requirements of CAA section 182(a)(3)(B) and covers Virginia's portion of the Washington, DC-MD-VA nonattainment area for the 2015 ozone NAAQS.

II. Summary of SIP Revision and EPA Analysis

On July 30, 2019, the Commonwealth of Virginia, through the Virginia Department of Environmental Quality (VADEQ), submitted, as a formal revision to its SIP, a statement certifying that Virginia's existing SIP-approved emissions statement program covers the Virginia portion of the Washington, DC-MD-VA nonattainment area for the 2015 ozone NAAQS and is at least as stringent as the requirements of CAA section 182(a)(3)(B). In its submittal, Virginia states that the emissions statement requirements of CAA section 182(a)(3)(B) are contained under 9VAC5-20-160 (Registration) of the Virginia Administrative Code and are SIP-approved under 40 CFR 52.2420(c). According to Virginia, these provisions mandate that facilities emitting more than 25 tpy of NO_x or VOC must submit emission statements to Virginia while those emitting less than 25 tpy must comply with inventory requirements.

The provisions under 9VAC5-20-160 that implement Virginia's emissions statement program

were approved into the Virginia SIP on May 2, 1995 (60 FR 21451).[1] These provisions require the owner of any stationary source that emits 25 tpy or more of VOC or NO_x and is located in an emissions control area designated under 9VAC5-20-206 (Volatile Organic Compound and Nitrogen Oxides Emissions Control Areas) to submit an emissions statement to the Virginia State Air Pollution Control Board by April 15 of each year for the emissions discharged during the previous calendar year.[2] Emissions statements are required to be prepared and submitted in accordance with 9VAC5-20-121 (Air Quality Program Policies and Procedures), which references Virginia's January 1, 1993 document AQP- 8 titled, "Procedures for Preparing and Submitting Emission Statements for Stationary Sources." The provisions under 9VAC5-20-121 were also approved into the Virginia SIP on May 2, 1995 (60 FR 21451).

EPA's review of the Commonwealth of Virginia's submittal finds that Virginia's existing, SIP-approved emissions statement program under 9VAC5-20-160 satisfies the emission statements requirements of CAA section 182(a)(3)(B) for stationary sources located in nonattainment areas in Virginia, including such sources in the Virginia portion of the Washington, DC-MD-VA nonattainment area, for the 2015 ozone NAAQS. Pursuant to CAA section 182, Virginia is

[1] The provisions under 9VAC5-20-160 were derived from VR120-02-31. EPA's May 2, 1995 direct final rulemaking (DFR) approved a SIP revision submitted by the Commonwealth of Virginia requesting the addition of provisions under VR120-02-31 paragraph B, which established Virginia's emissions statement program, and Appendix S (Air Quality Program Policies and Procedures), which described the procedure for preparing and submitting emissions statements for stationary sources, to the Virginia SIP. See 60 FR 21451. On March 6, 1992, the Virginia State Assembly enacted Chapter 216 – an act to amend Section 9- 77.7, Code of Virginia, which authorized reorganization of the Virginia Administrative Code, including reorganization of the air pollution control regulations, effective July 1, 1992. Beginning April 17, 1995, Virginia began publication of its air quality control regulations in the new format. On April 21, 2000, EPA approved a SIP revision from Virginia requesting the reorganization and renumbering of the Virginia SIP to match the recodification of Virginia's air pollution control regulations under the Virginia Administrative Code. See 65 FR 21315. As a result, the SIP approved provisions under VR120-02-31 and Appendix S are now under 9VAC5-20-160 and 9VAC5-20-121, respectively.

[2] The emissions control areas defined under 9VAC5-20-206 include the Northern Virginia Emissions Control Area, the Fredericksburg Emissions Control Area, the Richmond Emissions Control Area, the Hampton Roads Emissions Control Area, and the Western Virginia Emissions Control Area. The Northern Virginia Emissions Control Area consists of the localities of Arlington County, Fairfax County, Loudoun County, Prince William County, Stafford County, Alexandra City, Fairfax City, Falls Church City, Manassas City, and Manassas Park City.

required to have an emissions statement program for sources located in nonattainment areas. EPA finds the provisions under 9VAC5-20-160 satisfy the requirements of CAA section 182(a)(3)(B) for the 2015 ozone NAAQS because they apply to the Northern Virginia Emissions Control Area, which includes the Virginia portion of the Washington, DC-MD-VA 2015 ozone NAAQS nonattainment area (i.e. Arlington County, Fairfax County, Loudoun County, Prince William County, Alexandria City, Fairfax City, Falls Church City, Manassas City, and Manassas Park City). EPA also finds Virginia's emissions thresholds for sources that are required to submit an emissions statement meet the requirements of CAA section 182(a)(3)(B)(ii). As stated above, 9VAC5-20-160 requires the owner of any stationary source located in an emissions control area that emits 25 tpy or more of VOC or NO_x to annually submit an emissions statement. This 25 tpy threshold is equivalent to the threshold required by CAA section 182(a)(3)(B)(ii). As previously mentioned, per CAA section 182(a)(3)(B)(ii), states may waive this requirement for sources that emit less than 25 tpy of NO_x or VOC if the state provides an inventory of emissions from such class or category of sources as required by CAA sections 172 and 182. Virginia provides emissions inventories for nonattainment areas as required by CAA section 172(c)(3).[3] Therefore, EPA has determined that 9VAC5-20-160, which is currently in the Virginia SIP, is appropriate to address the emissions statement requirements in section 182(a)(3)(B) for the 2015 ozone NAAQS. EPA is proposing to approve, as a SIP revision, the Commonwealth of Virginia's July 30, 2019 emissions statement program certification for the 2015 ozone NAAQS as approvable under CAA section 182(a)(3)(B).

[3] See, e.g. "Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, and Virginia; 2011 Base Year Emissions Inventories for the Washington DC-MD-VA Nonattainment Area for the 2008 Ozone National Ambient Air Quality Standard," 80 FR 27255 (May 13, 2015).

III. Proposed Action

EPA is proposing to approve the Commonwealth of Virginia's SIP revision submitted on July 30, 2019, which certifies that Virginia's existing SIP-approved emissions statement program under 9VAC5-20-160 satisfies the requirements of the CAA section 182(a)(3)(B) for the 2015 ozone NAAQS. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) "privilege" for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information "required by law," including documents and information "required by Federal law to maintain program delegation, authorization or approval," since Virginia must "enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. . . ." The opinion concludes that "[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval."

Virginia's Immunity law, Va. Code Sec. 10.1-1199, provides that "[t]o the extent consistent with requirements imposed by Federal law," any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since "no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity."

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA

may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

V. Statutory and Executive Order Reviews

Under the CAA, the EPA 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).

The SIP is not approved to apply on any Indian reservation land as defined in 18 U.S.C. 1151 or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule consisting of Virginia's certification that its existing SIP-approved emissions statement program under 9VAC5-20-160 satisfies the requirements of CAA section 182(a)(3)(B) for the 2015 ozone NAAQS 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).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: January 28, 2020.

Cosmo Servidio,
Regional Administrator,
Region III.

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